(11)

No. 01-704-CFX Title: United States, et al., Petitioners
v.
Thomas Lamar Bean

Docketed: November 19, 2001 Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	Nov 9 2001	Application (01A384) to extend the time to file a petition for a writ of certiorari from November 19, 2001 to December 19, 2001, submitted to Justice Scalia.
	Nov 9 2001	Application (01A384) denied by Justice Scalia.
	Nov 19 2001	Petition for writ of certiorari filed. (Response due December 26, 2001)
	Dec 17 2001	Order extending time to file response to petition until December 26, 2001.
	Dec 26 2001	Brief of respondent Thomas Lamar Bean in opposition filed.
	Jan 2 2002	DISTRIBUTED for Conference of January 18, 2002
	Jan 10 2002	Reply brief of petitioners United States, et al. filed.
	Jan 22 2002	Petition GRANTED. SET FOR ARGUMENT October 16, 2002. **********
	Mar 1 2002	Order extending time to file the joint appendix and petitioners' brief on the merits to and including April 8, 2002.
	Apr 5 2002	Order further extending time to file the joint appendix and the government's brief on the merits to and including April 15, 2002.
	Apr 8 2002	Brief amicus curiae of Violence Policy Center filed.
	Apr 15 2002	Joint appendix filed.
	Apr 15 2002	Brief of petitioners United States, et al. filed.
	May 8 2002	Order extending time to file respondent's brief on the merits to and including June 14, 2002.
	Jun 14 2002	Brief of respondent Thomas Lamar Bean filed.
	Jun 14 2002	Brief amicus curiae of Law Enforcement Alliance of America, Inc. filed.
	Jun 14 2002	Brief amicus curiae of Second Amendment Foundation filed.
	Jul 17 2002	Reply brief of petitioners United States, et al. filed.
	Jul 23 2002	CIRCULATED.
	Aug 16 2002	Record filed.
	Aug 21 2002	Record filed.
	Oct 16 2002	ARGUED.

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Supreme Court, U.S.
FILED
01-704 NOV 9 2001

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

THOMAS LAMAR BEAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under federal law, a person who is convicted of a felony is prohibited from possessing firearms. The Secretary of the Treasury, acting through the Bureau of Alcohol, Tobacco, and Firearms (ATF), may grant relief from that prohibition if it is established to his satisfaction that certain preconditions are established. See 18 U.S.C. 925(c). Since 1992, however, every appropriations law for ATF has specified that ATF may not expend any appropriated funds to act upon applications for such relief. The question presented is whether, despite that appropriations provision barring ATF from acting on such applications, a federal district court has authority to grant relief from firearms disabilities to persons convicted of a felony.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America and the Bureau of Alcohol, Tobacco, and Firearms (ATF), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 253 F.3d 234. The opinion of the district court (App., *infra*, 12a-38a) is reported at 89 F. Supp.2d 828.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2001. A petition for rehearing was denied on August 21, 2001 (App., *infra*, 39a-40a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions—Title 18 Section 922(g)(1), Title 18 Section 925(c), and the applicable appropriations statutes—are set forth in the appendix. App., *infra*, 41a-43a.

STATEMENT

1. Under federal law, it is unlawful for any person convicted of a felony to transport, possess, or receive firearms or ammunition. 18 U.S.C. 922(g)(1). A person may apply to the Secretary of the Treasury for relief from the disabilities imposed by that prohibition. 18 U.S.C. 925(c). The Secretary "may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." *Ibid.* The Secretary has delegated his authority to act on applications for relief to the Director of the Bureau of Alcohol, Tobacco, and Firearms (ATF). 27 C.F.R. 178.144(b) and (d). Whenever the Secretary grants relief to any persons pursuant to this provision, "he shall promptly publish in the Federal Register notice of such action, and the reasons therefor." 18 U.S.C. 925(c).

A person whose application for relief is "denied" by ATF may file a petition with the federal district court for the district in which he resides for "judicial review of such denial." 18 U.S.C. 925(c). The court may admit additional evidence where failure to do so would result in a miscarriage of justice. *Ibid.* The scope of judicial review is governed by the Administrative Procedure Act, 5 U.S.C. 706. See S. Rep. No. 583, 98th Cong., 2d Sess. 26-27 (1984).

In 1992, the annual appropriations law for ATF provided that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1732. In each subsequent year, Congress has permitted the use of appropriated funds to process applications for relief filed by corporations, but it has retained the bar to the use of appropriated funds to process applications for relief filed by individuals.[1]

The Senate Report accompanying the first appropriations laws explained the purposes of the bar:

> After ATF agents spend many hours investigating a particular applicant they must determine whether or not that applicant is still a danger to public safety. This is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made. The Committee believes that the approximately 40 man-

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[1] Treasury and General Government Appropriations Act, 2002, Pub. L. No. 107-67, 115 Stat. 519; Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763A-129; Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 113 Stat. 434; Treasury and General Government Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-485; Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 111 Stat. 1277; Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-319; Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 471; Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2385; Treasury, Postal Service, and General Government Appropriations Act, 1994, Pub. L. No. 103-123, 107 Stat. 1228.

> years spent annually to investigate and act upon these investigations and applications would be better utilized to crack down on violent crime.

S. Rep. No. 353, 102d Cong., 2d Sess. 19-20 (1992). The House Report accompanying the fourth appropriations law reiterated those concerns:

> For the fourth consecutive year, the Committee has added bill language prohibiting the use of Federal funds to process applications for relief from Federal firearms disabilities. * * * [T]hose who commit felonies should not be allowed to have their right to own a firearm restored. We have learned sadly that too many of these felons whose gun ownership rights were restored went on to commit violent crimes with firearms. There is no reason to spend the Government's time or taxpayer's money to restore a convicted felon's right to own a firearm.

H.R. Rep. No. 183, 104th Cong., 1st Sess. 15 (1995).

2. In March 1998, respondent and three associates attended a gun show in Laredo, Texas. App., *infra*, 12a. After the show, respondent and his associates drove respondent's car to Nuevo Lardo, Mexico. *Id.* at 12a-13a. Mexican officials stopped the car at the port of entry and discovered approximately two hundred rounds of ammunition in the back of the car. *Id.* at 13a. Respondent admitted ownership of the car and the ammunition, but asserted that the ammunition had been inadvertently left in the car. *Ibid.* Respondent was convicted of importing ammunition into Mexico and sentenced to five years' imprisonment. *Ibid.*

After spending four months in a Mexican jail, respondent was transferred to the La Tuna Penitentiary, where he spent another month before being released. App., *infra*, 13a. Respondent was then placed on supervised release under the jurisdiction of the United States District Court for the Eastern District of Texas. The district court terminated supervision of respondent approximately ten months later, on August 30, 1999. *Id.* at 14a.

By virtue of his conviction in Mexico, respondent was prohibited from possessing, distributing, or receiving firearms. 27 C.F.R. 178.11 ("crime punishable" definition).[2] Respondent applied to ATF for relief from his firearms disabilities. App., *infra*, 15a. ATF informed respondent that it could not act on his application because ATF's annual appropriations law forbids it from expending any funds to investigate or act upon applications for relief from firearms disabilities. C.A. R.E., Tab 4, Exh. B.

Respondent then filed suit in the United States District Court for the Eastern District of Texas. App., *infra*, 12a. Respondent asked the district court to conduct its own inquiry into his fitness to possess a gun, and to issue a judicial order granting relief from his firearms disabilities. C.A. R.E., Tab 4. Respondent attached various affidavits from persons attesting to his fitness to possess firearms. *Ibid.*

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[2] There is a conflict in the circuits on whether a foreign conviction triggers firearms disabilities. Compare *United States* v. *Atkins*, 872 F.2d 94 (4th Cir.), cert. denied, 493 U.S. 836 (1989) (foreign conviction triggers firearms disabilities) and *United States* v. *Winson*, 793 F.2d 754 (6th Cir. 1986) (same) with *United States* v. *Concha*, 233 F.3d 1249 (10th Cir. 2000) (foreign conviction does not trigger firearms disabilities). In this case, however, respondent conceded (C.A. Br. 18) that his conviction in Mexico triggered firearms disabilities under 18 U.S.C. 922(g)(1), and the court of appeals did not address that issue. App., *infra*, 11a. That question is therefore not presented here.

In reliance on the Fifth Circuit's decision in *United States* v. *McGill*, 74 F.3d 64, cert. denied, 519 U.S. 821 (1996), the government moved to dismiss respondent's complaint. Mot. To Dismiss at 2-3. In *McGill*, the Fifth Circuit held that the appropriations bar prevents ATF from acting on applications for relief from firearms disabilities and that a district court has no authority to consider an application for relief in the first instance. 74 F.3d at 67. The government also argued that the district court lacked authority to rule on respondent's complaint, because a district court only has authority to review the "denial" of an application by ATF, and ATF's failure to act on respondent's application as a consequence of the appropriations bar did not constitute a "denial." Mot. To Dismiss at 3.

The district court denied the government's motion to dismiss. App., *infra*, 12a-38a. The district court concluded that *McGill* had been incorrectly decided and declined to follow it. *Id.* at 18a-29a. Specifically, the court concluded that, while the appropriations law prevents ATF from acting on applications for relief from firearms disabilities, a court retains authority to grant such relief. *Id.* at 24a. The court also concluded that ATF's failure to act on respondent's application constituted an effective denial of his application that was subject to judicial review. *Id.* at 29a-30a. After a hearing, the court determined that respondent was not likely to act in a manner dangerous to public safety and that granting relief from firearms disabilities to him would not be contrary to the public interest. *Id.* at 34a-36a. The court then entered a judgment granting respondent relief from his firearms disabilities. *Id.* at 37a-38a.

3. The court of appeals affirmed. App., *infra.*, 1a-11a. The court acknowledged that it had held in *McGill*

that the appropriations laws "reflected an intent to suspend the relief provided to individuals by § 925(c)." *Id.* at 4a. The court reasoned, however, that "we have a critical additional factor, the intervening passage of time and the resulting reality of the effective non-temporary 'suspension' of statutorily created rights." *Id.* at 9a. The court then held that it "must now conclude that merely refusing to allow the agency responsible for facilitating those rights to use appropriated funds to do its job under the statute is not the requisite direct and definite suspension or repeal of the subject rights." *Ibid.* The court further held that when ATF notified respondent that it would not act on his petition, respondent's "administrative remedies *de facto* were exhausted," and "the trial court had jurisdiction to entertain this appeal." *Ibid.* Finally, the court held that the district court "did not err as a matter of law" in granting respondent relief from his firearms disabilities. *Id.* at 11a.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit held in this case that a district court has authority to grant relief from firearms disabilities to persons who have been convicted of a felony. That holding conflicts with decisions of five other circuits. The Fifth Circuit's decision is also incorrect. The annual appropriations laws prevent ATF from acting on applications for such relief, and a district court does not have authority to assume the responsibility that Congress removed from ATF. The Fifth Circuit's decision also threatens to create the very dangers to public safety that Congress sought to avoid through imposition of the statutory bar in each annual appropriations law since 1992. Review by this Court is therefore warranted.

A. The Fifth Circuit's Decision Conflicts With Decisions Of Five Other Circuits

The Fifth Circuit held that, although Congress has prevented ATF from using funds to act on applications for relief from firearms disabilities, a district court has authority to perform that function. App., *infra*, 4a-9a. The Fifth Circuit specifically concluded that "merely refusing to allow the agency responsible for facilitating those rights to use appropriated funds to do its job under the statute is not the requisite direct and definite suspension or repeal of the subject rights." *Id.* at 9a. The Fifth Circuit's ruling squarely conflicts with decisions of five other circuits.

In *McHugh* v. *Rubin*, 220 F.3d 53 (2000), the Second Circuit held that "Congress could not have stated more clearly that the ATF is prohibited from acting on applications submitted by individuals pursuant to § 925(c)," *id.* at 58, and that "[t]he federal district courts are no more empowered than is the ATF to review individuals' applications for relief from federal firearms disabilities," *id.* at 59. Similarly, in *Mullis* v. *United States*, 230 F.3d 215, 221 (2000), the Sixth Circuit held that "Congress, through its appropriations act, has chosen to at least temporarily suspend the operation of § 925(c) in its entirety, thereby removing subject matter jurisdiction from the district court." The Fourth, Ninth, and Tenth Circuits have reached the same conclusion. *Saccacio* v. *ATF*, 211 F.3d 102, 104 (4th Cir. 2000) ("because section 925(c) authorizes judicial review of only the denial of an application for relief, and the ATF's failure to process Saccacio's application * * * is not the denial of an application, the district court correctly concluded that it was without subject-matter jurisdiction to adjudicate Saccacio's petition for review"); *Burtch* v. *United States Dep't of the Treasury*,

120 F.3d 1087, 1090 (9th Cir. 1997) ("the failure to appropriate investigatory funds should be interpreted as a suspension of that part of section 925(c) which is affected," and "the statute does not authorize the district court to build a record from scratch or make discretionary policy determinations in the first instance if the Secretary does not."); *Owen* v. *Magaw*, 122 F.3d 1350, 1353-1354 (10th Cir. 1997) ("We believe that this is an instance where Congress has chosen to suspend the operation of the [statute] through the appropriations acts[,]" and "in light of the absence of a denial by the [ATF] of an application by Owen for relief pursuant to 18 U.S.C. § 925(c), the district court lacked subject-matter jurisdiction and properly dismissed.").[3]

Thus, the Fifth Circuit has held that a district court has authority to grant relief from firearms disabilities to persons who have been convicted of a felony, while five other circuits have held that a district court lacks such authority. Review is warranted to resolve that square conflict in the circuits.

B. The Court Of Appeals' Decision Is Incorrect

1. The Fifth Circuit erred in holding that a district court has authority to grant relief from firearms disabilities to persons convicted of a felony. This Court has repeatedly held that Congress has authority under the Constitution to suspend or repeal substantive law through the enactment of an appropriations law. *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429, 440

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[3] In *Rice* v. *United States*, 68 F.3d 702 (3d Cir. 1995), a panel of the Third Circuit held that a district court has authority to grant relief from firearms disabilities. The Third Circuit has recently granted rehearing en banc in another case to consider whether *Rice* was correctly decided. See *Pontarelli* v. *ATF*, No. 00-1268 (3d Cir.).

(1992); *United States* v. *Will*, 449 U.S. 200, 222 (1980); *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940); *United States* v. *Mitchell*, 109 U.S. 146, 150 (1883). As the Court explained most recently in *Robertson*, 503 U.S. at 440, "although repeals by implication are especially disfavored in the appropriations context, * * * Congress nonetheless may amend substantive law in an appropriations statute, as long as it does so clearly."

Congress could not have more clearly expressed its intent to prohibit ATF from acting on applications to grant relief from firearms disabilities. In every ATF appropriations statute passed since 1992, Congress has provided that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." 106 Stat. 1732; 107 Stat. 1228; 108 Stat. 2385; 109 Stat. 471; 110 Stat. 3009-319; 111 Stat. 1277; 112 Stat. 2681-485; 113 Stat. 434; 114 Stat. 2763A-129; 115 Stat. 519. Congress enacted that prohibition because it concluded that determining whether to grant relief "is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made," and because it believed that the government's scarce resources "would be better utilized" on more pressing matters, such as "crack[ing] down on violent crime." S. Rep. No. 106, 103d Cong., 1st Sess. 20 (1993); S. Rep. No. 353, *supra*, at 19-20. The bar in each annual appropriations law reflects Congress's considered judgment that "those who commit felonies should not be allowed to have their right to own a firearm restored." H.R. Rep. No. 183, *supra*, at 15.

Thus, while 18 U.S.C. 925(c) has not been repealed, Congress has deliberately and unequivocally suspended its operation. Until such time as Congress removes the

statutory restriction, ATF is legally prohibited from processing applications for relief from firearms disabilities.

2. Congress did not suspend ATF's authority to grant relief from firearms disabilities only to have district courts assume that role. Prior to its suspension, Section 925(c) assigned broad discretion to the Secretary to determine whether an application for relief should be granted: Under Section 925(c), relief may be granted only if "it is established to the Secretary's satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. 925(c). Section 925(c) has never assigned any comparable authority to district courts to decide whether the conditions for relief are satisfied. Furthermore, even where the Secretary is satisfied that the prerequisites for relief are met, Section 925(c) provides only that the Secretary "may" grant relief, not that he must do so, and it "imposes no limitations on the factors that [he] may consider in determining who, among the class of eligible [applicants] should be granted relief." Compare *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996). The courts are not well-positioned to exercise the sort of policy discretion that the statute vests in an official of the Executive Branch.

Instead, courts play a far more limited role under Section 925(c): a person "whose application for relief from disabilities is *denied* by the Secretary may file a petition with the United States district court for the district in which he resides for a *judicial review* of such *denial*." 18 U.S.C. 925(c) (emphasis added). "By its

terms, § 925(c), gives the applicant the right to seek review in the district court only after the Secretary has denied [his] application." *McGill*, 74 F.3d at 66; see also, *e.g.*, *Saccacio*, 211 F.3d at 104; *McHugh*, 220 F.3d at 59; *Mullis*, 230 F.3d at 219.

In the context of Section 925(c), the plain meaning of a "denial" is "an adverse determination on the merits." *Burtch*, 120 F.3d at 1090; *Saccacio*, 211 F.3d at 104; see also *Webster's Third International Dictionary*, at 602 (1993) ("denial" means a "refusal to grant, assent to, or sanction: rejection of something requested, claimed, or felt to be due"). Because of the appropriations law, ATF no longer has authority to "deny" applications for relief under Section 925(c). The appropriations law forbids ATF from taking *any action* on applications for relief: it may neither grant nor deny them.

The appropriations law therefore not only suspends ATF's authority to act on applications for relief, it simultaneously removes the essential predicate for judicial review—an ATF "denial" of an application. Without an ATF denial, there is no role under Section 925(c) for the judiciary to play. As a result, "[t]he federal district courts are no more empowered than is the ATF to review individuals' applications for relief from federal firearms disabilities." *McHugh*, 220 F.3d at 59; see also *Burtch*, 120 F.3d at 1088-1090; *Owen*, 122 F.3d at 1351-1354; *Saccacio*, 211 F.3d at 103-105; *Mullis*, 230 F.3d at 217-221.

3. Even if ATF's failure to act on an application triggered judicial review, that would not give a court authority to issue an order granting relief from firearms disabilities. The scope of judicial review under Section 925(c) is governed by the Administrative Procedure Act, 5 U.S.C. 706. See S. Rep. No. 583, *supra*, at 26-27. With exceptions not relevant here, a

reviewing court has limited authority under the APA: A court may only "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. 706(1), or "hold unlawful" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. 706(2)(A).

ATF's decision to comply with the statutory directive to refrain from processing applications for relief does not violate those APA standards. "Given Congress's explicit instruction that the ATF should not spend any appropriated funds to process applications for the removal of firearm disabilities, [an applicant] could hardly argue that the ATF has acted unlawfully or unreasonably in failing to process his application." *Mullis*, 230 F.3d at 219. Similarly, "[t]he ATF's decision to comply with a congressional directive cannot be said to [be] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *McHugh*, 220 F.3d at 61. Thus, if a court had authority to review ATF's refusal to act on an application for relief from firearms disabilities, it would simply lead to an affirmance of ATF's refusal to act on the ground that such a refusal is required by the applicable appropriations law. A court could not condemn ATF's refusal to act as unlawful, much less make its own determination that firearms privileges should be restored.

4. A court's assumption of authority to grant relief from firearms disabilities would also be inconsistent with Congress's stated reasons for suspending ATF's authority. Congress disabled ATF from granting such relief because it believed that ATF could easily make mistakes that could have terrible consequences for innocent citizens. See pp. 3-4, *supra*. That risk is not diminished by shifting responsibility for decisions from ATF to federal district courts. In fact, such a shift in

responsibility only increases the dangers that Congress sought to forestall.

To grant relief from firearms disabilities, a finding must be made that the applicant's record and reputation are such that the applicant "will not be likely to act in a manner dangerous to public safety." 18 U.S.C. 925(c). In order to make that determination, ATF had a practice of conducting extensive field investigations. It interviewed the applicant, his references, probation officer, employers, neighbors, and friends. Indeed, before Congress enacted the funding restriction in 1992, ATF spent 40 man-years annually to investigate and act upon investigations conducted pursuant to Section 925(c). S. Rep. No. 353, *supra*, at 19-20.

The judiciary generally lacks the institutional capacity to conduct the kind of investigations that ATF is now forbidden from undertaking. As the Sixth Circuit explained in *Mullis*, "[w]hile district courts are well equipped to make credibility judgments and factual determinations, they are without the tools necessary to conduct a systematic inquiry into an applicant's background." 230 F.3d at 219. Rather than conducting a thorough background investigation, a district court must necessarily rely largely on the information that the parties furnish. The applicant will typically supply the district court "only with contacts who will supply positive information concerning the applicant's record and reputation." *Ibid.* At the same time, the appropriations law prevents ATF from conducting an investigation that could counter the evidence that the applicant presents. As a consequence, "the court would only be able to conduct a very one sided inquiry, relying largely on letters of recommendation and testimony from individuals hand selected by an applicant." *Id.* at 219-220. That process is particularly ill-suited to

protecting the public from the dangers that Congress sought to avert.

At the very least, district courts are no more able than ATF to protect the public from the risks associated with granting relief from firearms disabilities to persons who have been convicted of a felony. A court's assumption of such authority therefore cannot be reconciled with Congress's decision to suspend ATF's authority to grant such relief. "To infer that Congress intended to transfer this important and subjective task to the courts simply flies in the face of Congress' statements." *Owen*, 122 F.3d at 1354.

5. In *McGill*, the Fifth Circuit initially held that "Congress intended to suspend the relief provided by § 925(c)." 74 F.3d at 67. Indeed, it could not "conceive that Congress intended to transfer the burden and responsibility of investigating the applicant's fitness to possess firearms from the ATF to the federal courts, which do not have the manpower or expertise to investigate or evaluate these applications." *Ibid.*

The Fifth Circuit in this case departed from *McGill* on the ground that "we have a critical additional factor, the intervening passage of time and the resulting reality of the effective non-temporary 'suspension' of statutorily created rights." App., *infra*, 9a. For that reason, the court held that "[w]e must now conclude that merely refusing to allow the agency responsible for facilitating those rights to use appropriated funds to do its job under the statute is not the requisite direct and definite suspension or repeal of the subject rights." *Ibid.* That analysis is seriously flawed.

First, under this Court's controlling precedents, the question whether Congress intends to suspend the operation of substantive law by passage of an appropriations law is one of legislative intent. See pp. 9-10,

supra. Here, it is abundantly clear that Congress intended through each annual appropriations law to suspend the operation of Section 925(c). The passage of time does nothing to detract from that inference. There is no reason that the most recently enacted appropriation statute should be interpreted any differently from its identically worded predecessors. Indeed, the accumulation of the appropriations provisions only makes congressional intent to suspend the operation of Section 925(c) more emphatic. That is particularly true because all appellate court decisions since *McGill* have interpreted that succession of appropriation laws to suspend Section 925(c).

Second, under Section 925(c), convicted felons have never had a "right" to have their firearms privileges restored. Instead, prior to its suspension, Section 925(c) granted to the Secretary a discretionary power to lift the firearms bar, and to do so only if if it was established, to the *Secretary's* satisfaction, that an applicant would not be likely to act contrary to public safety and that granting relief would not be contrary to the public interest. There is every reason to give full effect to an explicit statutory restriction on the exercise of such a discretionary authority by an Executive Branch official. The court of appeals erred in failing to honor the plain intent of that restriction.

C. The Court Of Appeals' Decision May Cause Serious Adverse Consequences

The court of appeals' decision has the potential to create serious adverse consequences. In 1999, 80,000 persons were convicted of felonies in Texas alone. Criminal Justice Policy Council, *Total Adult Convictions and Deferred Adjudications for All Felony Offenses, Fiscal Years 1988-1999*, at 1 (updated Jan. 5,

2001) <http://www.cjpc.state.tx.us/StatTabs/CourtConvictions/00Courtconvictions.pdf>. Under the court of appeals' decision, all convicted felons would have the right to apply to a court for relief from their firearms disabilities, and to have a determination made by the court in the first instance based on a record that is constructed largely by the applicant himself. There is therefore a significant risk that persons who pose a real danger to public safety might be rearmed. Even if most applications are ultimately denied, substantial resources would have to be devoted to litigating those requests in court.

Congress enacted the appropriations bar precisely because it feared that felons who have the prohibition on their possession of firearms lifted may go on to commit violent felonies, and because it believed that the government's time and taxpayer's money should not be spent on making decisions that are so fraught with danger. H.R. Rep. No. 183, *supra*, at 15. This Court should grant certiorari to prevent those adverse consequences from ensuing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40304

THOMAS LAMAR BEAN, PETITIONER-APPELLEE

v.

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS;
UNITED STATES OF AMERICA,
RESPONDENTS-APPELLANTS

[Filed: June 20, 2001]

Before: POLITZ, DEMOSS and STEWART, Circuit Judges.

POLITZ, Circuit Judge:

The Government appeals the trial court's finding that it had jurisdiction to review the application of Thomas Lamar Bean for relief from the federal firearm disabilities resulting from a conviction in Mexico, as well as its grant of said relief therefrom. We affirm.

BACKGROUND

The facts of this case illustrate in caps underscored why Congress added the relief provision to the Federal Firearms Act, giving certain convicted felons an avenue to regain the right to possess a firearm. They are set forth in great detail in the trial court's opinion; we merely summarize them here.

In March 1998, Bean, a Bureau of Alcohol, Tobacco and Firearms licensed firearms dealer, was in Laredo, Texas, participating in a gun show. One evening he and three assistants decided to cross the border into Mexico for dinner. He directed his assistants to remove any firearms and ammunition from his vehicle, a Chevrolet Suburban, before crossing the border; however, a box of ammunition containing approximately 200 rounds inadvertently was left in the back. The box was in plain view and Mexican customs officers saw it when they sought to enter the Mexican Port of Entry at Nuevo Laredo, Tamaulipas, Mexico. At the time importing ammunition into Mexico was considered a felony.[1] The three assistants were subsequently released but Bean, as the owner of the Suburban and the ammunition, was charged and convicted of the felony of unlawfully importing ammunition.[2]

Bean was incarcerated in Mexico for approximately six months before being released to the custody of the United States under the International Prisoner Transfer Treaty. He thereafter spent another month in federal prison before being released under supervision. As a convicted felon, under 18 U.S.C. § 922(g)(1) Bean lost all rights to possess firearms. Section 925(c) of the statute, however, provides a means for relief from the firearms disabilities. Upon completion of his period of

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[1] Purportedly because of the publicity arising from this case the offense has been reduced to a misdemeanor.

[2] The record reflects the difficulties experienced by Bean during his arrest and initial incarceration, primarily based upon procedural issues which were compounded by his unfamiliarity with the Spanish language. Bean and the trial court both refer to these difficulties as raising constitutional concerns. Our disposition of this appeal does not rely thereon.

supervision in July, 1999, Bean petitioned the BATF for such relief so that he might return to his business.

At issue herein is the action and inaction of Congress since 1992. For this nigh decade, Congress has stated in its annual budget appropriation bill that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C § 925(c)."[3] Because the BATF could not use any appropriated funds to fulfill its responsibilities under the statute, it sent Bean a notice that it would not act upon his request due to the congressional action. Bean then petitioned the district court, contending that the BATF's letter denied his petition and exhausted his administrative remedies.

The district court, in its detailed Memorandum Opinion, discussed the statute, congressional actions, the various circuit opinions on this issue, including our decision in *United States* v. *McGill*,[4] and determined that it did, in fact, have jurisdiction to hear Bean's appeal. In granting Bean's petition it further found that the facts of this case underscore why § 925(c) permitted not only judicial review, but judicial supplementation of the record to prevent a miscarriage of justice.

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[3] *See* Treasury, Postal Service and General Government Appropriations Act, 1993, Pub.L. No. 102-393, 106 Stat. 1729, 1732 (1992). The first year Congress denied the BATF funds to investigate *any* convicted felon. Beginning in Fiscal Year 1994, and in all subsequent appropriation acts applying to the BATF, a provision was added allowing funds to be used to investigate convicted *corporate* felons. *See infra* note 11.

[4] 74 F.3d 64 (5th Cir. 1996) (finding that federal courts have no jurisdiction to hear appeals from individuals).

ANALYSIS

Jurisdiction

In *McGill* we noted that Congress, through its appropriations acts, had reflected an intent to suspend the relief provided to individuals by § 925(c). As a consequence we opined that we lacked subject matter jurisdiction. As the Government correctly notes, ordinarily an inferior court is not at liberty to disregard the mandate of a superior court.[5] But in the instance herein presented, we must examine carefully the reasons and analysis by the trial court, and our earlier decision in light of, notably, the intervening passage of time and its effect.

The trial court, as had the *McGill* panel, extensively detailed the legislative history of the relief provisions and reached a different conclusion, noting: "Ultimately, the Court recognizes that an advocate can find an abundance of legislative history to support his position."[6] We do not here parse the committee or floor commentary but, rather, examine congressional action/inaction and its continuing effect.

As noted in the trial court's opinion, Congress first amended the Federal Firearms Act in 1965 to provide the potential and mechanism for certain convicted felons to obtain relief from federal firearms disabilities by petitioning the Secretary of the Treasury. It amended the relief provision in 1986 to provide for judicial review of executive decisions in order to better ensure that relief was available for those felons whose convic-

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[5] *See e.g., Gegenheimer* v. *Galan*, 920 F.2d 307 (5th Cir. 1991).

[6] *Bean* v. *United States*, 89 F.Supp.2d 828, 835 (E.D. Tex. 2000).

tions were based on technical or unintentional violations.

In large measure, as a result of newspaper editorials about the cost to taxpayers of performing the investigations necessary under the relief provision,[7] as well as a report published by the Violence Policy Center listing instances wherein convicted felons had their firearms privileges restored and committed violent crimes,[8] a senate bill entitled the Stop Arming Felons (SAFE) Act was introduced in 1992 to eliminate the relief provision.[9]

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[7] *See, e.g., Why Are We Rearming Felons?*, Washington Post, Sept. 25, 1991, at A24 (describing the relief provision as a "loophole"); and *Felon Gun Program Should Be Disabled*, Chicago Sun-Times, July 1, 1992, at 31.

[8] Josh Sugarman, *Putting Guns Back Into The Hands Of Felons: 100 Case Studies of Felons Granted Relief From Disability Under Federal Firearms Laws*, Violence Policy Center (1992). The Center is a Washington, D.C. based gun-control advocacy group.

[9] *See* 138 Cong. Rec. S2674-04, S2675 (daily ed. March 3, 1992) (floor comments on S. 2304 by its co-sponsor, Sen. Lautenberg (D-N.J.)). We note with particular irony that according to Sen. Lautenberg the original relief provision was enacted specifically to rescue the Winchester Firearms Co., whose parent corporation Olin Winchester had pleaded guilty to felony counts on a kickback scheme and whose very existence was threatened by the subsequent denial of its ability to possess and sell firearms. As previously noted, beginning in 1993 Congress amended its appropriations language to *permit* the BATF to process petitions for relief made by corporations. In the case at bar we are presented with a situation that is virtually indistinguishable from that used to justify those actions, *i.e.*, absent the ability to possess and sell firearms Bean will lose his business. Bean *is* his "corporation," and the inequities of the situation are readily apparent. To the suggestion that a corporation, unlike an individual, cannot be a physical threat to use firearms to harm the public we note that the

That bill, however, was never reported out of the Senate Judiciary Committee.

Although it obviously has the power, Congress has not enacted legislation eliminating or amending § 925(c). Rather, both the House and Senate Appropriations Committees proposed language for the Treasury, Postal Service, and General Government Appropriations Act for Fiscal Year 1993 that precluded the BATF from using any appropriated funds to investigate petitions for such relief.[10] That language was incorporated in the appropriations bill ultimately passed that year and has been included in each subsequent annual appropriations act relating to BATF funding.[11]

We observed in *McGill* that "Congress has the power to amend, suspend or repeal a statute by an appropriations bill, as long as it does so clearly."[12] We cited

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record is replete with testimony from legislators, law enforcement officers and BATF agents as to Bean's lawful character.

[10] *See* H.R. Rep. 102-618 (1992); S. Rep. 102-353 (1992).

[11] Treasury, Postal Service, and General Government Appropriations Act, 1994, Pub. L. No. 103-123, 107 Stat. 1226, 1228 (1993); Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2382, 2385 (1994); Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 468, 471 (1995); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-319 (1996); Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 111 Stat. 1272, 1277 (1997); Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105- 277, 112 Stat. 2681-485 (1998); Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 113 Stat. 430, 434 (1999); and Treasury and General Government Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-129, (2000).

[12] *McGill*, 74 F.3d at 66.

Robertson v. *Seattle Audubon Soc*[13] as authority for that proposition. *Robertson* opined "[A]lthough repeals by implication are especially disfavored in the appropriations context . . . Congress nonetheless may amend substantive law in an appropriations statute, as long as it does so clearly."[14]

The "especially disfavored" language hales from the high court's opinion in *Tennessee Valley Authority* v. *Hill, et al.*,[15] wherein the Court stated that the doctrine disfavoring repeals by implication "applies with ever *greater* force when the claimed repeal rests solely on an Appropriations Act."[16] In the subsequent *Will* case, upon which the *Robertson* Court relied, it addressed Congress' failure to fund promised federal pay raises previously authorized by statute by refusing to appropriate funds for those raises in each year's Appropriation Act. In *Will* the Court found Congress' actions were clear and intentional, and thus effectively rescinded the authorized raise for each year.[17] That decision led to the Court's comments in *Robertson*, noted above, upon which the *McGill* panel relied.

We find the facts at bar readily distinguishable from *Will*, and thus distinguishable from *Robertson*. *Will* involved authorized salary increases, a purely financial right, that Congress refused to fund. When it passed

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[13] 503 U.S. 429, 112 S.Ct. 1407, 118 L.Ed.2d 73 (1992).

[14] *Robertson*, 503 U.S. at 440, 112 S.Ct. 1407 (citing *United States* v. *Will, et al.*, 449 U.S. 200, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980)).

[15] 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978).

[16] *Id.* at 190, 98 S.Ct. 2279 (emphasis in original).

[17] With the exception of federal judges for two of the four years in question, where the Appropriation Act violated the Compensation Clause.

the Executive Salary Cost-of-Living Adjustment Act[18] in 1975 Congress promised certain federal employees annual cost-of-living salary increases, based upon certain financial criteria. It then changed its mind and rescinded *that year's* increase in each of the four years beginning in 1977.[19]

In the case at bar, Congress is not merely promising money then changing its mind and not making it available. Nor is it directly suspending a statutory provision. In enacting § 925(c) Congress granted certain persons administrative and judicial rights. The SAFE Act proposed to withdraw those rights, but Congress did not adopt that withdrawal. The Government insists, however, that Congress indirectly has abrogated those rights by necessarily recognizing same but declining expenditure of any funds for their enforcement. We find that action clearly distinguishable from the facts in the cited precedential cases and inimical to our constitutional system of justice.

In its early review of this conundrum, the *McGill* panel relied on *Robertson*. In addition to the noted factual differences of *Robertson*, *Will*, and *Dickerson*,

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[18] Pub. L. No. 94-82, 89 Stat. 419 (1975).

[19] The Supreme Court considered and rejected the contention that the authorized increase remained outstanding but unfunded, concluding that the raise itself was rescinded. *Will*, 449 U.S. at 224, 101 S.Ct. 471. In support of its position the Court cited *United States* v. *Dickerson*, 310 U.S. 554, 60 S.Ct. 1034, 84 L.Ed. 1356 (1940). *Dickerson* also pertained to statutorily authorized financial payments that were rescinded by an Appropriation Act, in that case the payment of an enlistment allowance for those military personnel who re-enlisted during the fiscal year. Like *Will*, *Dickerson* pertained to purely financial rights that Congress then rescinded by expressly refusing to fund same, and is distinguishable herefrom.

we have a critical additional factor, the intervening passage of time and the resulting reality of the effective non-temporary "suspension" of statutorily created rights. We must conclude that Congress seeks to abrogate administrative and judicial rights it created, by using funding bills, after declining to address actual amendments to or revocation of the creating statute. Section 925(c) was enacted for apparently valid reasons, and citizens like Bean are entitled to the rights therein created and authorized unless and until Congress determines to change same. We must now conclude that merely refusing to allow the agency responsible for facilitating those rights to use appropriated funds to do its job under the statute is not the requisite direct and definite suspension or repeal of the subject rights. We further hold that when the BATF notified Bean that it would not act on his petition, his administrative remedies *de facto* were exhausted.[20] Accordingly, the trial court had jurisdiction to entertain this appeal.

The Merits

The Government cites as error the trial court's grant of relief, contending without citing any authority that when reviewing the actions of an administrative agency the court "stands in the shoes" of that agency and is bound by the applicable federal regulations. Here the Government contends 27 C.F.R. § 178.144(d) precludes

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[20] The BATF advised that it was not accepting petitions from individuals for restoration of rights, and told Bean he could apply "if and when Congress acts to remove the restriction currently imposed." This is not a case of mere agency delay in processing his petition, it is complete preclusion of administrative remedies for an indefinite, possibly infinite, period of time. Bean's administrative options were foreclosed, and thus exhausted for purposes of § 925(c).

relief where the petitioner is prohibited from possessing all types of firearms in the state in which he resides. It asserts that because Bean resides in Texas and under Texas law a convicted felon cannot possess firearms for five years after being released from confinement or supervised release,[21] it could not have granted his petition for relief in any event; therefore, the district court erred as a matter of law in doing so.

At the threshold we unqualifiedly reject the suggestion that a court stands in the shoes of an agency and is bound by *all* of its implementing regulations. Substantive federal regulations carry the force and effect of federal law; however, interpretive regulations serve merely to guide a court in applying a statute.[22] Generally, where a regulation "appears supported by the plain language of the statute and is adopted pursuant to the explicit grant of rulemaking authority," that regulation is considered as having legislative effect and accorded more than mere deference.[23] We find nothing in 27 C.F.R. § 178.144(d) that would come under such a definition. Nothing in § 925(c) authorizes the Secretary to restrict relief only to those cases where relief is available at the state level; indeed, nothing in the statute pertaining to relief even refers to the states. Section 925(c) pertains strictly to federal firearms disabilities and to relief from those federal disabilities. Absent any statutory language tying federal disabilities to state disabilities, or authorizing the Secretary to do so, we must hold that 27 C.F.R. § 178.144(d) is merely

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[21] Tex. Penal Code Ann. § 46.04(a)(1)(Vernon 1994).

[22] *Batterton* v. *Francis*, 432 U.S. 416, 425 n. 9, 97 S.Ct. 2399, 53 L.Ed.2d 448 (1977).

[23] *Atkins* v. *Rivera*, 477 U.S. 154, 162, 106 S.Ct. 2456, 91 L.Ed.2d 131 (1986).

an interpretive regulation and does not bind the district court in its determination.[24] Concluding that the trial court did not err as a matter of law in granting the relief requested, we need not and do not address its determination that Bean's foreign conviction was not a predicate offense triggering the provisions of 18 U.S.C. § 922(g)(1).

CONCLUSION

We are mindful of the serious concerns articulated about convicted felons regaining the right to possess firearms, and of the need for congressional review and enhancement of the safeguards and procedures for appropriately accomplishing this apparently worthy goal, but we are faced herein with the almost incredible plight of Thomas Bean who, at most, was negligent in not ensuring that his associates completely performed the simple task directed, and who served months in Mexican and U.S. prisons for a simple oversight. We do not believe that any reasonable observer is persuaded that his offense creates a likelihood he represents a threat to the public's well-being, and it is beyond peradventure to believe that Congress, or those seeking to rescind § 925(c), intended for someone like Bean to lose his livelihood on the basis of the facts such as are before us. Neither equity nor the law require such an injustice.

The judgment appealed is AFFIRMED.

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[24] For similar reasons we find that the provision in § 178.144(d) stating that the Director will not *ordinarily* grant relief if the applicant has not been discharged from parole or probation for a period of at least 2 years is also interpretive, particularly in light of its qualified language.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
Beaumont Division

No. CIV. A. 1:99-CV-724

THOMAS LAMAR BEAN, PETITIONER

v.

UNITED STATES OF AMERICA, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS; RESPONDENTS

[Filed: Feb. 22, 2000]

MEMORANDUM OPINION

JOE FISHER, District Judge.

Before the Court is the Petitioner's "Petition for Relief from Disabilities Under the Federal Firearms Act." After considering the Petition, the evidence submitted, the Response from the Respondents, and arguments from counsel, the Court GRANTS the Petition. A separate Order will be entered in accordance with this Memorandum.

I. BACKGROUND

On Saturday, March 14, 1998, Mr. Thomas Lamar Bean ("Petitioner," "Mr. Bean," or "Bean") was attending a gun show as a dealer in Laredo, Texas. At the conclusion of the show, Mr. Bean and his three assis-

tants decided to cross the United States-Mexican border to have dinner at a restaurant in Nuevo Laredo, Mexico. Before leaving, Mr. Bean instructed his assistants to remove all firearms and ammunition from his 1994 Suburban. However, as the assistants removed said items from the vehicle, they inadvertently left approximately two hundred rounds of ammunition in plain view in the back of Mr. Bean's Suburban.

Mr. Bean's vehicle was stopped at the Mexican Port of Entry, Nuevo Laredo, Tamaulipas, Mexico, where the ammunition was discovered by Mexican officials. Although all four individuals were initially arrested, Mr. Bean's associates were soon released. Bean, however, was detained and charged with introduction of ammunition into the Republic of Mexico since he was the owner of the vehicle and the ammunition. While acknowledging that the ammunition was in plain view in the back of his Suburban, Bean stated that he was unaware that the ammunition was in the vehicle at the time he crossed the border. He was also unaware that possession of ammunition was an offense in the Republic of Mexico.

Mr. Bean was immediately taken into custody and almost two months later, on May 27, 1998, was sentenced to a term of imprisonment of five years and was fined in the amount of 17,679 pesos or the equivalent of twenty days of community service work. He remained in a Mexican jail until September 21, 1998, when he was transferred to the La Tuna Penitentiary in Anthony, Texas by virtue of the International Prisoner Transfer Treaty and the applicable federal statutes under 18 U.S.C. § 4100, *et seq.*

Bean was then released from La Tuna Penitentiary on October 21, 1998 and returned to his home in Orange

County, Texas. Pursuant to 18 U.S.C. § 4106A(b)(3), jurisdiction over the Petitioner was conferred upon the United States District Court for the Eastern District of Texas. Petitioner was initially placed on supervised release but this restriction was terminated by an order signed by this Court on August 30, 1999.

Due to this Mexican conviction (and despite the termination of supervised release), Mr. Bean could not own or possess a firearm. Title 18 U.S.C. § 922(g)(1) prohibits any person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" from shipping, transporting, or possessing any firearms or ammunition. However, 18 U.S.C. § 925(c) permits any person to apply to the Secretary of Treasury for relief from the disabilities imposed under § 922(g)(1). The Secretary of Treasury is authorized to restore firearm privileges to the applicant "if it is established to [the Secretary's] satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. § 925(c). The Secretary of the Treasury has delegated his authority to grant relief to the Director of the Bureau of Alcohol, Tobacco and Firearms ("BATF" or "ATF"). *See* 27 C.F.R. § 178.144.

Title 18 U.S.C. § 925(c) also states that "any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court . . . for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice. . . ." 18 U.S.C. § 925(c).

Congress however, in 1992, enacted the Treasury, Postal Service, and General Government Appropriations Act (the "Appropriations Act"), mandating that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. § 925(c)."[1] Since then, Congress has imposed similar funding limitations for each fiscal year.[2] This essentially meant that the ATF could no longer conduct investigations because they had been given no appropriations to do so.

On July 14, 1999, counsel for Mr. Bean wrote the Bureau of Alcohol, Tobacco and Firearms requesting the relief authorized by § 925(c). The ATF replied and informed Bean that the agency is not accepting applications for restoration of firearms privileges since Congress has specifically denied funding for ATF investigations, or actions on applications for § 925(c) relief, through a series of appropriations measures

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[1] *See* Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992).

[2] *See* Treasury, Postal Service, and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 113 Stat. 430 (1999); Treasury, Postal Service, and General Government Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998); Appropriations Act, 1998, Pub. L. No. 105-61, 111 Stat. 1272, 1277 (1997); Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-319 (1996); Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. Treasury, Postal Service, and General Government 468, 471 (1995); Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2382, 2385 (1994); Treasury, Postal Service, and General Government Appropriations Act, 1994, Pub. L. No. 103-123, 107 Stat. 1226, 1228 (1993).

dating back to October 1992. Mr. Bean was instructed by the ATF to contact their office if and when Congress lifts the restrictions. Bean then filed in this Court his "Petition for Relief of Disabilities Under the Federal Firearms Act."

II. ANALYSIS

Bean's petition presents four questions for this Court: (1) whether the decision by Congress not to fund the review of applications for relief submitted to the ATF suspends the relief available provided for under 18 U.S.C. § 925(c); (2) whether the inaction by the ATF constitutes a defacto denial of an application such that a United States district court may consider a petition for judicial review of the denial; (3) whether a foreign conviction may serve as the predicate offense for a prohibition of firearms privileges under 18 U.S.C. § 922(g)(1); and (4) whether Mr. Bean will be "likely to act in a manner dangerous to public safety" and if the "granting of the relief would . . . be contrary to the public interest." 18 U.S.C. § 925(c).

A. Congress' failure to fund the review of applications by the ATF was not a suspension of *relief* under 18 U.S.C. § 925(c), but rather Congress only intended the suspension of the ATF's ability to investigate or act upon applications for relief by individuals.

This Court does not question that it is Congress' exclusive power to appropriate money and establish the jurisdiction of inferior federal courts. *See* U.S. Const., Art. I, § 8; U.S. Const., Art III, § 1. The Court also recognizes that Congress may also use appropriation acts to amend or repeal substantive legislation. *See Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 440, 112 S.Ct. 1407, 1414, 118 L.Ed.2d 73 (1992); *United States* v. *Dickerson*, 310 U.S. 554, 555, 60 S.Ct. 1034, 1035, 84 L.Ed. 1356 (1940); *Director, OWCP* v. *Alabama by Products Corp.*, 560 F.2d 710, 719 (5th Cir. 1977).

Nevertheless, it is a general maxim that repeals by implication are "strongly" disfavored. *See Johnson* v. *Robison*, 415 U.S. 361, 373-74, 94 S.Ct. 1160, 1168-69, 39 L.Ed.2d 389 (1974). Before courts will hold that Congress has used an appropriation act to repeal substantive legislation or preclude judicial review of administrative action, the intention to do so must be clearly stated. *See Robertson*, 503 U.S. at 440, 112 S. Ct. at 1414 (Congress "may amend substantive law in an appropriations statute, as long as it does so clearly."); *Johnson* v. *Robison*, 415 U.S. 361, 373-74, 94 S. Ct. 1160, 1168-69, 39 L.Ed.2d 389 (1974) (courts require "clear and convincing evidence of congressional intent . . . before a statute will be construed to restrict access to judicial review").

Ultimately, this Court is relegated to determining Congress' intent, with respect to 18 U.S.C. § 925(c), when it suspended funds for the ATF to conduct investigations and whether such intent was "clear." The Court begins this analysis by discussing a similar case from the Third Circuit Court of Appeals, *Rice* v. *U.S., Department of Alcohol, Tobacco and Firearms*, 68 F.3d 702 (3d. Cir. 1995).

In 1970, Phillip Rice ("Rice") pleaded guilty in state court to several felonies involving stolen auto parts. *Id.* at 704. More than twenty years later, Rice submitted an application to the ATF for restoration of his firearm privileges. *Id.* at 705. In response, the ATF sent Mr. Rice a letter notifying him that it could no longer process his application because Congress had passed an

appropriation bill which suspended funds for the ATF to investigate or act upon such applications. *Id.* Mr. Rice, pursuant to the express language in 18 U.S.C. § 925(c), then filed a petition for judicial review in federal district court. *Id.* at 705.

Concerning the question of legislative intent, the Court found that the Appropriation Acts failed "to show a clear intent to repeal section 925(c) or to preclude judicial review of (the) BATF's refusal to grant relief from firearms disabilities." *Id.* at 707. In making the determination, the Court looked at the language contained in the 1993 Appropriations Act and found it extremely important that the Appropriations Acts did not "expressly preclude a court from reviewing BATF's refusal to process an application for relief." *Id.* Subsequently, the Court held that the Appropriations Acts neither repealed 18 U.S.C. § 925(c) nor precluded "judicial review of administrative decisions concerning a convict's application for restoration of his firearm privileges." *Id.*

The Fifth Circuit Court of Appeals has also considered this issue in *United States* v. *McGill*, 74 F.3d 64 (5th Cir. 1996). McGill, who had previously pleaded guilty to two felony offenses, wrote the ATF requesting information about applying for relief from his 18 U.S.C. § 922(g)(1) disability. The ATF informed McGill that it was no longer accepting applications due to the appropriations measures. Like Rice, McGill then filed an application with the district court for the removal of his disabilities. However, the district court promptly dismissed McGill's application. *Id.* at 65-66.

In affirming the lower court, the Fifth Circuit quickly determined that the controlling question was Congress' intent as it suspended funds for the ATF to conduct

investigations. The Court first quoted the language of Section 925(c) and noted that the ATF has authority to act on these applications. It then considered the legislative history of some of the applicable appropriations measures in light of the government's argument that relief had been suspended. *Id.* at 67. The Court noted that the Appropriations Committee expressed concern over: (1) the use of limited resources for investigating these cases; and (2) the consequences to innocent citizens if BATF makes a mistake in granting relief to a felon from his firearm disabilities.[3] The court based its

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[3] For example, House Report No. 102-618 states:

"Under current law, a person convicted of a crime punishable by imprisonment for a term exceeding one year may not lawfully possess, receive, ship, or transport firearms. . . . [BATF] may grant relief from these disabilities where it is determined that the applicant for relief will not be likely to act in a manner dangerous to public safety and that the granting of relief would not be contrary to the public interest."

"Under the relief procedure, [B]ATF officials are required to guess whether a convicted felon or person committed to a mental institution can be entrusted with a firearm. After [B]ATF agents spend many hours investigating a particular applicant for relief, there is no way to know with any certainty whether the applicant is still a danger to public safety. Needless to say, it is a very difficult task. Thus, officials are now forced to make these decisions knowing that a mistake could have devastating consequences for innocent citizens."

"Thus, the Committee believes that the $3.75 million and the 40 man-years annually spent investigating and acting upon these applications for relief would be better utilized by [B]ATF in fighting violent crime. Therefore, the Committee has included language which states that no appropriated funds be used to investigate or act upon applications for relief from Federal firearms disabilities."

decision on the circumstances and the explanation by the Appropriations Committee and stated:

> "[I]t is clear . . . that Congress intended to suspend the relief provided by § 925(c). We cannot conceive that Congress intended to transfer the burden and responsibility of investigating the applicant's fitness to possess firearms from the [B]ATF to the federal courts, which do not have the manpower or expertise to investigate or evaluate these applications." *Id.* at 67.

Thus, the court concluded that relief from federal firearms disabilities under Section 925(c) had been "clearly" suspended by the Appropriations Acts. Subsequently, the Fifth Circuit affirmed the district court's dismissal of the Plaintiff's petition for review. *Id.* at 68.

1. This Court's Analysis of all relevant legislative history.

This Court has diligently searched the legislative history of both 18 U.S.C. § 925(c) and the Appropriations Acts. In doing so, the Court has found many contradictory statements by Congressmen regarding these provisions. This Court has concluded that in looking at the legislative history as a whole, it does not reach the level of "clarity" needed to suspend the type of relief which is expressly provided for in the statute. *See* 18 U.S.C. § 925(c).

Individuals with convictions which are punishable by more than one year have long been prohibited from owning a firearm. Until 1965, there were no exceptions

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H.R. Rep. No. 102-618, at 13-14 (1992); see also S. Rep. No. 103-106, at 20 (1993) (same); S. Rep. No. 102-353, at 19-20 (1992) (same).

to this rule. However, beginning with the original relief provision in 1965, Congress believed the strict application of the Federal Firearms Act worked to the disadvantage of some individuals who posed no danger to the public by reason of firearm possession. *See* H.R. Rep. No. 89-708, at 1 (1965). The committee expressed concern that "[n]o consideration can be given to any circumstances which might cause a judge to properly mitigate or even suspend the punishment. Nor may consideration be given to the fact that the crime might be wholly unrelated to firearms and to the disability imposed by the Federal Firearms Act." *Id.*

Thereafter, Congress amended the Federal Firearms Act by providing a relief provision. *See* U.S.C. § 910 (Supp. II 1965) (repealed 1968). However, instead of having the courts make the determination with regards to relief to particular individuals and corporations, Congress empowered the Secretary of the Treasury with the task. *Id.* The relief provision provided the Secretary with a broad and subjective standard for either granting or denying relief. *Id.*

In 1986, Congress amended the relief provision and expressly provided for judicial review of relief denials by the ATF. *See* Firearms Owners' Protection Act, Pub. L. No. 99-308, § 1, 100 Stat. 449 (1986) (current version at 18 U.S.C. §§ 921-930 (1994)). In regards to the change, the Judiciary Committee reported that "(t)his section reforms the provisions of 18 U.S.C. § 925(c) to *improve the ability of the deserving members of the public to obtain relief from the legal disqualification from firearms ownership.*" *See* H.R. Rep. No. 99-495, at 1 (1986) (emphasis added). Also, a Senate Report in 1984 explained that the legislation "is intended to provide a 'safety valve' whereby persons

whose offenses were technical and nonviolent, or who have subsequently demonstrated their trustworthiness" may obtain relief. *See* S. Rep. No. 98-583, at 26 (1984). Adding judicial review to the existing legislation was intended to afford individuals not inclined to engage in criminal activity the "essential" opportunity to demonstrate trustworthy character.[4]

This history seems to establish three things: (1) Congress realized that not all persons convicted of felonies should be denied firearms privileges forever; (2) Congress provided the ATF with the ability to reinstate firearms privileges; and (3) Congress intended the judiciary to give the final word on the appropriateness of a denial by the ATF. *See generally* Ronald C. Griffin, *Obtaining Relief from Federal Firearms Disabilities: Did Congress Really Suspend the Relief Available to Felons Through Appropriations Acts?*, 23 Okla. City U.L. Rev. 977 (1998).

Since 1993, the funding cuts have not allowed the ATF to conduct investigations with regard to relief applications. The McGill Court used the following Senate Report as conclusive evidence that Congress intended to suspend 18 U.S.C. § 925(c):

> "(u)nder the relief procedure, (B)ATF officials are required to determine whether a convicted felon, including persons convicted of violent felonies or serious drug offenses, can be entrusted with a firearm. After (B)ATF agents spend many hours investigating a particular applicant(,) they must determine whether or not that applicant is still a danger to public safety. This is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made. The Committee believes that the approximately 40 man-years spent annually to investigate and act upon these investigations and applications would be better utilized to crack down on violent crime."

McGill, 74 F.3d at 67 (quoting S. Rep. No. 102-353, at 19 (1992)).

However, the McGill Court used the above statement without reviewing any congressional hearings that were the basis for the statement found in the Senate Report. The transcript of a Senate subcommittee hearing provides insight as to the true reason for the funding cuts. Here, the Director of the ATF responded to questions pertaining to the relief provisions. *See* Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1993: Hearings on H.R. 5488 Before the Subcomm. of the Senate Comm. on Appropriations, 102d Cong. 69 (1993).

The Director testified that although "every year about 3,000 to 4,000 people express an interest in (applying for relief)," only 1,000 applications (approximately) are found eligible to be acted upon. *Id.* However, the ATF had requested $3.7 million to fund the relief from disabilities program for the 1993 fiscal year. *Id.* According to these numbers, the ATF was spending an average of $3,700 per investigation.

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[4] *See* S. Rep. No. 98-583, at 26 (1984). In this Senate Report, the Senate Committee on the Judiciary worried that lack of review by the ATF and the judiciary "could arbitrarily exclude from relief persons who might otherwise be more trustworthy than those eligible, particularly if they have been convicted of technical or unintentional violations. . . . *[M]aking relief available to such persons is essential.*" *Id.* (emphasis added).

The only "intent" that can be understood from these reports is that Congress was concerned with the ATF's inefficient and wasteful administrative review process rather than a desire to curb the availability of relief itself. It is true that Congress can suspend a statute through the use of appropriations acts if it does so "clearly." It is also true that Congress has modified the relief provision found in 18 U.S.C. § 925(c) several times. However, each time Congress has amended § 925(c), it has done so with a concern toward those persons who possess guns in a lawful manner but are denied possession of firearms because of unrelated felony convictions. Given the genuine concern that Congress has expressed pertaining to the "essential" right of individuals to be given the opportunity to demonstrate trustworthy character, it is consistent to infer that Congress withheld funding to the ATF for *economic reasons*, not because they intended outright suspension of relief for worthy individuals. If Congress "intended" to change anything, it deleted administrative action from the statute, but otherwise left judicial relief available.

Furthermore, the argument that Congress intended to absolutely suspend relief to convicted persons ignores the multitude of ways under 18 U.S.C. § 921(a)(20) that a state felon may obtain restoration of his federal firearm rights by operation of state law and without the involvement of any special ATF competency. Section 921(a)(20) provides that "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction. . . ." 18 U.S.C. § 921(a)(20). The law of the convicting jurisdiction defines pardons, expungements, and restora-

tions of civil rights. *See Caron* v. *United States*, 524 U.S. 308, 118 S. Ct. 2007, 2011, 141 L.Ed.2d 303 (1998) (citing *Beecham* v. *United States*, 511 U.S. 368, 371, 114 S.Ct. 1669, 128 L.Ed.2d 383 (1994)). Thus, under § 921(a)(20), a state can restore the civil rights of a person convicted of a felony in that state such that his federal firearm disability is removed.[5] *McGrath* v. *United States*, 60 F.3d 1005, 1008 (2d Cir. 1995) recognized that "many states restore civil rights to convicted felons by means of a general law stating that all rights shall be reinstated upon the service of a sentence." Other states authorize officials to issue certificates of restoration after a given period of time following sentence or parole. *See Id.; United States* v. *Mullis*, 1998 WL 957334, at *3 (W.D. Tenn. 1998).

Congress, under § 921(a)(20), specifically allows for restoration of firearms privileges. Its clear that Congress never evinced a belief that a federal administrative agency was solely and specially capable of making the requisite determination. Instead, this Court concludes that Congress manifested exactly the opposite intent because it allowed states such wide latitude in restoring for state felons the same federal disability at issue here. It is inconsistent with the totality of the statutory scheme to hold that Congress intended that a convicted individual would never have the right to prove himself worthy of restoration of firearms privileges.

It is this Court's opinion that Congress' failure to fund the review of applications by the ATF was not a complete suspension of *relief* under 18 U.S.C. § 925(c),

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[5] A state cannot, however, remove a federal felon's federal firearm disability. *See Beecham*, 511 U.S. at 368, 114 S.Ct. 1669.

but rather Congress only intended the suspension of the ATF's ability to investigate or act upon applications for relief by individuals.

2. The proper place of legislative history in this case.

There is plenty of conflicting legislative history regarding this issue. Ultimately, the Court recognizes that an advocate can find an abundance of legislative history to support his position. The Court believes that the prudent thing to do is to focus in on language of the statute. After reviewing the pages and pages of committee notes, senate reports, and "hearings before subcommittees of committees,"[6] the Court reminded itself that statutory interpretation begins with the language of the statute itself. *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 557-58, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990). And if the language of the statute is clear, "that is the end of the matter, and the court must give effect to [the] unambiguously expressed intent of Congress." *Norfolk & Western Railway Co.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 128, 111 S.Ct. 1156, 1163, 113 L.Ed.2d 95 (1991).

The fact of the matter is that 18 U.S.C. § 925(c) allows for relief from disabilities under the Federal Firearms Act. True, the ATF no longer has the funds in which to conduct their investigations. However, *the statute still provides for judicial review.* As one court has recently stated, "If Congress wants to preclude all applications by convicted felons, . . . it should so state and not attempt to achieve that result by means that

[6] For example, *see* Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1993: Hearings on H.R. 5488 Before the Subcomm. of the Senate Comm. on Appropriations, 102d Cong. 69 (1993).

are 'indirect' at best." *McHugh* v. *Rubin*, 49 F.Supp.2d 105, 110, (E.D.N.Y. 1999).

It depends whose side you represent as to which committee report you choose to employ and which committee report you choose to ignore. And in reality, committee reports are not an authoritative interpretation of what the statute meant, nor an authoritative expression of what that Congress intended. *Pierce* v. *Underwood*, 487 U.S. 552, 567-68, 108 S. Ct. 2541, 2551-52, 101 L.Ed.2d 490 (1988). In this Court's opinion, the legislative history on the issue is far from "clear." If various district and appellate courts read the exact same legislative history and come to different conclusions (as the courts do on this issue), then it is this Court's opinion that the legislative history is far from "clear."

This is a textbook case on why the courts should be hesitant to use legislative history to suspend any substantive right which is expressly available in statutes. After reviewing all possible legislative history, this Court almost concurs with Justice Scalia when he stated that "it would be better . . . to stop confusing the . . . Court, and not to use committee reports at all." *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597, 621, 111 S. Ct. 2476, 2490, 115 L.Ed.2d 532 (1991) (Scalia, J., concurring). Legislative history does have its purpose, but we must remember that "[r]eliance on legislative history in divining the intent of Congress is . . . a step to be taken cautiously." *Piper* v. *Chris-Craft Ind.*, 430 U.S. 1, 26, 97 S. Ct. 926, 941, 51 L.Ed.2d 124 (1977). After all, legislators legislate by legislating; not by talking in committee meetings.

3. Courts are suited to make the ultimate determination of the petitioner's application for relief.

The McGill Court is concerned that the judiciary is not a proper forum for determining whether applicants "are likely [to] act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. § 925(c); *McGill*, 74 F.3d at 67.

On the contrary, this Court believes that courts are capable of deciding whether to grant or deny an individual's relief from disabilities request. As in the case now before this Court, the burden would be on the applicant to submit evidence that he would not act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. This evidence would include such things as the applicant's record, reputation, and the underlying reason for the disability. In addition, the court could require the applicant to submit additional evidence before making its determination on whether to grant relief.

Moreover, allowing a court to grant the relief solves several concerns expressed by Congress and the circuit courts. First, it would shift the financial burden from the government to the applicant. As in this case, the applicant would be responsible for paying court costs and attorneys fees. Second, instead of the ATF conducting investigations on the applicant, the applicant would have to secure all the necessary evidence in order to receive relief. And, if the court deems more evidence is needed, it will be up to the applicant to secure such evidence. Third, a court is a better-suited forum for deciding these issues because it is adjudicative in nature. In addition, if the court needs to know

how the ATF had conducted its investigations in the past, this information is available in the Code of Federal Regulations and case law. *See* 27 C.F.R. § 178.144; *Smith* v. *Brady*, 813 F. Supp. 1382, 1383-84 (E.D. Wis. 1993) (describing ATF's investigative procedures). Courts can decide relief questions without the need of ATF expertise, and if investigative work needs to be done, the applicant himself would have to conduct it. *See* Ronald C. Griffin, *Obtaining Relief from Federal Firearms Disabilities: Did Congress Really Suspend the Relief Available to Felons Through Appropriations Acts?*, 23 Okla. City U.L. Rev. 977 (1998).

This Court recognizes the importance of making the correct decision on the applicant's request for relief under the Federal Firearm's Act. However, part of the day-to-day role of the court is to make character determinations of the individuals before it. The judiciary is adjudicative in nature and is capable of handling this sensitive matter.

B. Inaction by the ATF constitutes a defacto denial of an application such that a United States district court may consider a petition for judicial review of the denial.

18 U.S.C. § 925(c) states that "[a]ny person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court . . . for a judicial review of such denial." The Government in this case argues that since the ATF has not expressly "denied" Mr. Bean's petition for relief, this Court does not have jurisdiction to hear the matter.

The general rule concerning exhaustion is "'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative

remedy has been exhausted.'" *McKart* v. *United States*, 395 U.S. 185, 193, 89 S.Ct. 1657, 1662, 23 L.Ed.2d 194 (1969) (quoting Myers, 303 U.S. at 50-51, 58 S.Ct. at 463); *see also McCarthy*, 503 U.S. at 144-45, 112 S.Ct. at 1085-86 ("This Court long has acknowledged the general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts.") (citing *Myers*, 303 U.S. at 50-51 and n. 9, 58 S.Ct. at 463 and n. 9). "Exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy*, 503 U.S. at 145, 112 S.Ct. at 1086.

However, this Court holds that exhaustion of administrative remedies in this case is excused. Exhaustion of administrative remedies which would be wholly futile or inadequate due to lack of appropriations waives Petitioner's obligation to exhaust such administrative remedies. *See McCarthy* v. *Madigan*, 503 U.S. 140, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992). It seems clear to this Court that Congress did not intend to apply rigidly the doctrine of exhaustion of administrative remedies in this context because it gave the district courts discretion to create or supplement the administrative record when necessary to avoid a miscarriage of justice. *See* 18 U.S.C. § 925(c); *Rice* v. *United States*, 68 F.3d 702, 709 (3d Cir. 1995). In sum, "Plaintiffs cannot be expected to exhaust their administrative remedies when there are no administrative remedies for them to exhaust." *Chan* v. *Reno*, 932 F. Supp. 535, 540 (S.D.N.Y. 1996). Accordingly, this Court holds that inaction by the ATF constitutes a defacto denial of an application such that a United States district court may consider a petition for judicial review of the denial.

C. A foreign conviction cannot, as a defacto rule, serve as the predicate offense for a prohibition of firearms privileges under 18 U.S.C. § 922(g)(1).

18 U.S.C. § 922(g)(1) makes it unlawful for a person who has been convicted in "any court" of a crime punishable by imprisonment for a term exceeding one year to possess a firearm. Both the Fourth Circuit, *United States* v. *Atkins*, 872 F.2d 94 (4th Cir. 1989), and the Sixth Circuit, *United States* v. *Winson*, 793 F.2d 754 (6th Cir. 1986), have addressed this issue and concluded that the a defendant may be restricted from possessing a firearm based on his having been convicted of offenses in courts outside the United States.

In particular, the Sixth Circuit supported its decision by stating that "[s]ince the object of the statute is to prevent the possession of firearms by individuals with serious criminal records [citations omitted], we can perceive no reason why the commission of serious crimes elsewhere in the world is likely to make the person so convicted less dangerous than he whose crimes were committed within the United States." *Winson*, at 793 F.2d at 758. The dangerous flaw with this reasoning is that a "serious" crime in one country is not necessarily considered "serious" in the United States.

The circumstances of Mr. Bean's conviction are disturbing to this Court. Mexican law requires an accused person to furnish a statement regarding the crime charged, even if the statement is incriminating. The arrested person can be charged with a separate offense should the arrested person fail to make such statement.

Knowing that Mr. Bean could not read, speak, or understand the Spanish language, the Mexican officials

prepared a statement for Mr. Bean to sign. Bean was then instructed to sign the documents prepared in Spanish without the benefit of an interpreter who could explain to Mr. Bean what the documents stated or represented.[7] Mr. Bean came to find out later that the documents which he signed amounted to a confession. Pursuant to the signed confession, Mr. Bean was ultimately convicted and sentenced to a term of imprisonment of five years in Mexico for the "Introduction of Ammunition into the Republic of Mexico."

This Court believes that the punishment imposed on Mr. Bean in Mexico was far too severe, especially in light of how the Mexican officials handled his arrest, trial, and conviction. Mr. Bean was carrying a box of ammunition. This is hardly a crime "serious" enough to take away an individual's right to possess a firearm. The Court recognizes the right of Mexico to legislate its own laws within its own borders. However, even Mexican lawmakers have realized that the penalty does not fit the crime. After Mr. Bean's case was made public through the media, the Republic of Mexico relaxed the criminal statute in question to make the offense of introducing firearms or ammunition across its border a misdemeanor offense with only a fine on the first occasion.

This case is a perfect illustration as to why the phrase "any court" in 18 U.S.C. § 922(g)(1) cannot be

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[7] The record is not clear as to whether Mr. Bean had counsel during the crucial time periods throughout his arrest, trial, conviction, and subsequent imprisonment in Mexico. Mr. Bean stated that he did not have an attorney for much of his stay in Mexico. However, there is also evidence to suggest that he knowingly and voluntarily waived his right to an attorney and hired a Mexican C.P.A. to help him in his quest to return to the United States.

interpreted to mean "any court in the world regardless of the severity of the crime or the due process which the defendant was entitled during the defense of his case."[8]

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[8] *See* Martha Kimes, *The Effect of Foreign Criminal Convictions Under American Repeat Offender Statutes: A Case Against the Use of Foreign Crimes in Determining Habitual Criminal Status*, 35 Colum. J. Transnat'l L. 503, 518-21 (1997).

The above Note focuses on the use of foreign crimes in determining habitual criminal status. However, the same arguments apply with respect to using foreign convictions as a predicate offense for a prohibition of firearms under 18 U.S.C. § 922(g)(1). This Note states as follows:

> "In practice, the use of foreign convictions . . . contravenes the principle that defendants should be treated equally. Because some countries display a much more punitive policy than others by criminalizing more behaviors and prosecuting violations of the law more aggressively, the use of foreign convictions . . . invites arbitrary distinctions in punishment simply based on whether a defendant happens to have committed a prior crime in a country with strict, rather than lenient, policies. Despite the same actual conduct, different defendants could be prosecuted for very different 'crimes' (or not prosecuted at all) depending solely on the punitive attitude of the country in which the conduct was committed; defendants who have committed the same acts in the past, then, will start off on very different and arbitrarily unequal footings in subsequent United States proceedings that seek to take into account prior foreign convictions."
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> "It is within each country's power to determine what punishment to prescribe for crimes committed within its borders, but the fact that different countries do decide to prosecute very different crimes and impose very different punishments compounds the difficulty of using foreign convictions. . . . Add to this the fact that prior criminal convictions from certain countries are necessarily easier for prosecutors to discover than others, and it is clear that the use

D. This Court has determined that Mr. Bean will not be "likely to act in a manner dangerous to public safety" and the "granting of the relief would not be contrary to the public interest." 18 U.S.C. § 925(c).

Mr. Bean is a resident of Orange County, Texas, in the Eastern District of Texas. He is sixty years of age, has been married to his wife since 1962, and has two adult children. Before his conviction in Mexico, Mr. Bean was a licensed firearms dealer. He has also worked as a car dealer in Port Arthur, Texas for several years.

The Court starts the analysis as to Mr. Bean's character by taking notice that Mr. Bean has never been charged with or convicted of a crime in the United States, except for minor traffic offenses. He has also submitted the following evidence to support that he

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of foreign convictions will penalize defendants with convictions from some countries much more strictly than others."

"Furthermore, procedural due process concerns are automatically raised with the use of foreign criminal convictions. The American concept of due process is one that has slowly developed and evolved over many years, ultimately providing a large body of procedural safeguards that work together to guarantee an acceptable level of fairness in criminal trials. The whole system of due process protections that the American system provides amounts to more than just the sum of the individual procedural safeguards of which it is made. Although other countries have due process clauses in their constitutions and many countries provide criminal defendants with most of the same safeguards that the United States provides, no other system truly matches the rules that have been deemed necessary in the United States to protect both individual fairness and reliability of convictions. . . ."

would not be a danger to public safety if he were allowed to possess a firearm:

1. During the hearing of January 20, 2000, Carl Fronabarger, an inspector for the Bureau of Alcohol, Tobacco and Firearms, testified that he was responsible for checking Petitioner's firearms records as a licensed dealer and found Petitioner to be a cooperative licensee and to maintain excellent records.

2. During the hearing of January 20, 2000, M.E. "Duke" Gorris, Chief of Police of Port Arthur, Jefferson County, Texas, testified that he personally knows Petitioner and confirmed Petitioner's reputation for being a law abiding citizen of the community and a cautious licensed firearms dealer when Petitioner held his license.

3. During the hearing of January 20, 2000, Lionel Herrera, a deputy sheriff from near Laredo, Texas, confirmed Petitioner's trustworthiness and good character.

4. During the hearing of January 20, 2000, Joe Bob Kinsel, Jr., a well-known and respected businessman and business competitor of Petitioner testified that he has known Petitioner for approximately 20 years and confirmed Petitioner's good personal and business reputation and credible character.

5. During the hearing of January 20, 2000, John Neil, a local businessman and friend of Petitioner's who has hunted with Petitioner in the

past, testified that Petitioner was a safe handler of firearms.

6. During the hearing of January 20, 2000, several letters of recommendation were admitted into evidence. *See* Exhibit 6. The letters were written by the following individuals: (1) James L. Reynolds, Chief of Police, Vidor Texas; (2) Mike White, Sheriff of Orange County Sheriff's Department; (3) M.E. Gorris, Chief of Police, Port Arthur, Texas; (4) Stephen B. Savoy, City Marshal, Groves Police Department; (5) Buddie Hahn, State District Judge, 260th Judicial District, Orange County, TX; (6) Paul M. Fukuda, Assistant District Attorney, Orange County, Texas; (7) Dr. Carl J. Beaudry, Petitioner's Orthopedic Surgeon, Port Arthur, Texas; (8) Thurman Bobo, President of the Young Men's Business League, Beaumont, Texas; (9) Joe E. Polk, President and Chairman of the Board of Buddy Chevrolet, Inc., Port Arthur, Texas; and (10) Mark E. Viator, Pastor of the Friendship Baptist Church, Beaumont, Texas. All of these letters refer generally to the Petitioner's good moral character, integrity, and reputation.

Mr. Bean has satisfied his burden to this Court in establishing that he "will not be likely to act in a manner dangerous to public safety" and that "the granting of relief will not be contrary to the public interest." 18 U.S.C. § 925(c).

CONCLUSION

For the reasons discussed above, Mr. Bean's "Petition for Relief from Disabilities Under the Federal Firearms Act" is to be GRANTED. A separate Order will be entered in accordance with this Opinion.

ORDER

On the 20th day of January, 2000, came on to be heard the Petition for Relief from Disabilities Under Federal Firearms Act filed in the above entitled and numbered cause of action by Petitioner, THOMAS LAMAR BEAN, who appeared in person and by and through his attorney of record.

Respondents, UNITED STATES OF AMERICA, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, appeared by and through Mr. Paul Naman, Assistant United States Attorney.

The Court having considered the pleadings, evidence and argument of counsel, finds that the circumstances regarding the disability imposed by law and Petitioner's record and reputation are such that Petitioner will not be likely to act in a manner dangerous to public safety and that the granting of the relief requested would not be contrary to the public interest, and that said petition should be granted.

In accordance with the Memorandum Opinion entered on this date, it is therefore ORDERED, ADJUDGED AND DECREED in accordance with 18 U.S.C. § 925(c) that Petitioner, THOMAS LAMAR BEAN, is hereby GRANTED relief from all disabilities imposed by Federal laws with respect to Petitioner's acquisition, receipt, transfer, shipment, transportation, or possession of firearms resulting from his foreign conviction on

May 27, 1998, in Nuevo Laredo, Tamaulipas, Republic of Mexico.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40304

THOMAS LAMAR BEAN, PETITIONER-APPELLEE

v.

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS;
UNITED STATES OF AMERICA,
RESPONDENTS-APPELLANTS

Appeal from the United States District Court for the Eastern District of Texas, Beaumont

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[Filed: Aug. 21, 2001]

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 6/20/01, 5 Cir., ____, ___ F.3d _____)

Before: POLITZ, DEMOSS and STEWART, Circuit Judges.

PER CURIAM:

(_) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. APP. P. and 5th Cir. R.

35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this case en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ HENRY A. POLITZ
HENRY A. POLITZ
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX D

1. § 922. Unlawful Acts

* * * * *

(g) It shall be unlawful for any person -

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * * * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

2. § 925. Exception: Relief from disabilites

* * * * *

(c) A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose application for relief from

disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice. A licensed importer, licensed manufacturer, licensed dealer, licensed collector conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter, shall not be barred by such disability from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

* * * * *

3. Act of Nov. 12, 2001, Pub. L. No. 107-67, 115 Stat. 514.

An Act

TREASURY AND GENERAL GOVERNMENT APPROPRIATIONS ACT, 2002

* * * * *

TITLE I–DEPARTMENT OF THE TREASURY

* * * * *

Bureau of Alcohol, Tobacco and Firearms

SALARIES AND EXPENSES

* * * * *

519:

* * * none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c): * * *

* * * * *

Identical language can be found at: Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763A-129; Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 113 Stat. 434; Treasury and General Government Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-485; Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 111 Stat. 1277; Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-319; Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 471; Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2385; Treasury, Postal Service, and General Government Appropriations Act, 1994, Pub. L. No. 103-123, 107 Stat. 1228.

Supreme Court, U.S.
FILED
DEC 26 2001

No. 01-704

IN THE

Supreme Court of the United States

United States of America, et al.,

Petitioners,

v.

Thomas Lamar Bean,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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December 26, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Federal law prohibits a person who is convicted of a crime punishable by imprisonment for a term exceeding one year from possessing firearms. The Secretary of the Treasury, acting through the Bureau of Alcohol, Tobacco, and Firearms (ATF), may grant relief from that prohibition if the applicant meets certain criteria. See 18 U.S.C. § 925(c). The denial of such relief is subject to judicial review. *Id.* Since 1992, appropriations bills have specified that ATF may not expend funds to act upon applications under Section 925(c). Neither those appropriations bills nor any other statute, however, has suspended the availability of judicial review.

The question presented is whether the annual appropriations provisions barring ATF from expending appropriated funds to act upon applications for relief from federal firearms disabilities also repeal the jurisdiction of federal district courts to grant relief from firearms disabilities.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Thomas L. Bean ("Respondent") respectfully submits that the petition for a writ of certiorari should be denied.

STATEMENT

Respondent, a respected former firearms dealer, was arrested by Mexican authorities at the border when his assistants inadvertently left ammunition in plain view in the rear of respondent's sport-utility vehicle. Respondent was convicted in Mexico of illegally importing ammunition and was imprisoned in that country for several months. The conviction rested on a confession that Mexican authorities prepared in Spanish and required respondent to sign, notwithstanding that respondent did not speak or understand the Spanish language.

This case involves whether, subsequent to the Mexican conviction, respondent has the right to transport, possess, or receive firearms under federal law. The district court held that he has that right on two independent grounds: (i) respondent's firearm privileges were never revoked because the specific circumstances surrounding the Mexican conviction were not sufficient to terminate petitioner's firearms privileges under 18 U.S.C. § 922(g)(1); and (ii) in any event, respondent was entitled to have his firearms privileges restored under 18 U.S.C. § 925(c) because the evidence conclusively established that respondent presented no danger to the community and granting the relief would not be contrary to the public interest.

On the government's appeal, the Fifth Circuit affirmed on the basis of the district court's second holding, concluding that a prior Fifth Circuit decision in *United States* v. *McGill*, 74 F.3d 64 (1996), construing various budget bills as temporarily suspending the availability of judicial review under Section 925(c), had been undermined by "the intervening passage of time and its effect." Pet. App. 4a. The court of ap-

peals explicitly left the district court's first holding – that respondent's firearms privileges were never suspended in the first instance – undisturbed. *Id.* 11a.

I. Respondent was a licensed firearms dealer and is a respected member of his community. See generally Pet. App. 35a-36a (district court's findings of facts). On March 14, 1998, respondent attended a gun show in Laredo, Texas, and at the conclusion of the show decided to have dinner with his assistants in nearby Nuevo Laredo, Mexico. Although respondent directed the assistants to remove all firearms and ammunition from his vehicle, they inadvertently left ammunition of mixed calibers (approximately 200 rounds) in plain view in the rear cargo area, where it was seen by Mexican border officials. They arrested respondent because he owned the vehicle and the ammunition. He was held in custody for two months and then convicted on the basis of a statement that Mexican officials prepared in Spanish and required respondent to sign, notwithstanding that he did not speak that language. Respondent's Mexican conviction only involved ammunition, not the possession of firearms or any crime involving drugs or violence.

Mexican authorities imprisoned respondent for four months, then transferred him to the United States pursuant to the International Prisoner Transfer Treaty and applicable federal statutes. He was placed on supervised release a month later and was finally released on August 30, 1999. See Pet. App. 12a-14a.

A federal statute, 18 U.S.C. § 922(g)(1) (hereinafter referred to as "§ 922(g)(1)"), makes it a crime for any person "who has been convicted in any court[] of a crime punishable by imprisonment for a term exceeding one year" to transport, possess, or receive firearms or ammunition. Under 18 U.S.C. § 925(c) (hereinafter referred to as "§ 925(c)"), persons subject to § 922(g)(1) may apply to the Secretary of the Treasury for relief from that disability on the ground that the applicant "will not be likely to act in a manner dangerous to public

safety and that the granting of the relief would not be contrary to the public interest." If the application is "denied by the Secretary" (or the Bureau of Alcohol, Tobacco, and Firearms (hereinafter referred to as the "ATF") as the Secretary's designee (see 27 C.F.R. § 178.144(b)), the applicant may "file a petition" for relief in federal district court. "The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice." 18 U.S.C. § 925(c).

II. Pursuant to § 925(c), respondent requested that ATF grant him relief from any firearms disability arising from the Mexican conviction. ATF responded that it would not act on the application. Congress, ATF explained, had withheld any funds for it to investigate or act on applications under § 925(c). See Pet. App. 15a-16a.

III. Respondent then filed a petition in federal district court to have his firearms privileges restored. The district court ruled for respondent on two separate grounds.

a. Acting *sua sponte*, the district court held that, in light of the specific circumstances surrounding the Mexican conviction, respondent was not subject to the firearms disability of § 922(g)(1). The district court recognized the holdings of other courts that § 922(g)(1) applies to convictions "in courts outside the United States," but found a "dangerous flaw with this reasoning": "a 'serious' crime in one country is not necessarily considered 'serious' in the United States." Pet. App. 31a. Deeming respondent's conduct a felony, the district court concluded, would be "far too severe" because he was merely "carrying a box of ammunition." *Id.* 32a. Indeed, "even Mexican lawmakers have realized that the penalty does not fit the crime": "After Mr. Bean's case was made public through the media, the Republic of Mexico relaxed the criminal statute in question to make the offense of introducing firearms or ammunition across its border a misdemeanor offense with only a fine on the first occasion." *Id.*

The district court relied heavily on the "disturbing" facts surrounding respondent's arrest and conviction:

> Knowing that Mr. Bean could not read, speak, or understand the Spanish language, the Mexican officials prepared a statement for Mr. Bean to sign. Bean was then instructed to sign the documents prepared in Spanish without the benefit of an interpreter who could explain to Mr. Bean what the documents stated or represented. Mr. Bean came to find out later that the documents which he signed amounted to a confession.

Id. 31a-32a. In sum, the district court concluded, "[t]his case is a perfect illustration as to why the phrase 'any court' in 18 U.S.C. § 922(g)(1) cannot be interpreted to mean 'any court in the world regardless of the severity of the crime or the due process [to] which the defendant was entitled during the defense of his case.'" *Id.* 32a-33a.

b. The district court separately held that it had jurisdiction to consider respondent's application under § 925(c) (see Pet. App. 16a-30a) and that the application should be granted (see *id.* 34a-36a).

On the jurisdictional question, the district court reasoned that § 925(c) explicitly provides applicants with a right of judicial review. Although Congress had withdrawn funding for ATF to act on applications, it had not taken any steps to remove the federal courts from the process. Particularly given that this Court has deemed findings of implied repeals of substantive law through funding restrictions to be "'strongly' disfavored" (Pet. App. 17a (quoting *Johnson* v. *Robison*, 415 U.S. 361, 373-74 (1974)), the district court concluded that the funding restrictions on *ATF* were not sufficiently clear to deprive applicants of any right of *judicial* review. *Id.* 25a-26a.

In response to the government's reliance on excerpts of legislative history expressing a concern that firearms privileges not be wrongfully restored to dangerous felons, which according to the government implicitly suggested a congressional intent to block even the courts from acting under § 925(c), the court "diligently searched the legislative history

of both 18 U.S.C. § 925(c)" and the relevant appropriations acts, but found only "many contradictory statements." *Id.* 20a. See also *id.* 27a ("If various district and appellate courts read the exact same legislative history and come to different conclusions (as the courts do on this issue), then it is this Court's opinion that the legislative history is far from 'clear.'"). Ultimately, "it is consistent to infer that Congress withheld funding to the ATF for *economic reasons*, not because they intended outright suspension of relief for worthy individuals." *Id.* 24a (emphasis in original).

The district court explained that the government's characterization of Congress' intent also could not be rationalized with the overall statutory scheme: under 18 U.S.C. § 921(a)(20), "a state felon may obtain restoration of his federal firearm rights by operation of state law and without the involvement of any special ATF competency" in a variety of ways, including through "pardons, expungements, and restorations of civil rights" under state law. Pet. App. 24a. Indeed, "'many states restore civil rights to convicted felons by means of a general law stating that all rights shall be reinstated upon the service of [a] sentence'" or "after a given period of time following sentence or parole." *Id.* 25a (quoting *McGrath* v. *United States*, 60 F.3d 1005, 1008 (CA2 1995)). It thus cannot be said that Congress intended to preclude individuals convicted of felonies from having their firearms privileges restored.

The district court also concluded that respondent's application had been "denied" by ATF, triggering the judicial review provisions of § 925(c). "Congress did not intend to apply rigidly the doctrine of exhaustion of administrative remedies in this context," the court explained, "because it gave the district courts discretion to create or supplement the administrative record when necessary to avoid a miscarriage of justice." Pet. App. 30a. Here, exhaustion is not required because it "would be wholly futile or inadequate due to lack of appropriations." *Id.*

c. On the merits of respondent's application, the district court compiled an extensive record, ultimately finding it indisputable that respondent "will not be likely to act in a manner dangerous to public safety and that the granting of the relief requested would not be contrary to the public interest." Pet. App. 37a. The district court heard live testimony to that effect from, *inter alios*, an ATF inspector, a local chief of police, and a deputy sheriff. *Id.* 35a. The court also received written submissions to the same effect from, *inter alios*, a state court judge, two local chiefs of police, a local sheriff, a local city marshal, and a local prosecutor. *Id.* 36a.

IV. While this case was pending in the district court, respondent pursued a second avenue for relief from any firearms disability. Respondent sought and secured a state court declaration that, in light of "the circumstances of [respondent's] conviction in Mexico and the subsequent reduction of the sentence imposed for a like offense to the equivalent of a misdemeanor offense," respondent "is not a convicted felon as that term is defined under Texas law, including but not limited to any such definition or construction of the term 'felon' in the Texas Penal Code." Order of Feb. 25, 2000, No. D-990, 424-C (Orange Cty., TX, 260th Jud. Dist.).

V. On the government's appeal, a panel of the Fifth Circuit unanimously affirmed the district court's decision. The court was "mindful of the serious concerns articulated about convicted felons regaining the right to possess firearms," but concluded that it was "beyond peradventure to believe that Congress, or those seeking to rescind § 925(c), intended for someone like Bean to lose his livelihood on the basis of the facts such as are before us." Pet. App. 11a.

Recognizing that *United States* v. *McGill*, 74 F.3d 64 (CA5 1996), had construed the funding restrictions on ATF as suspending the operation of § 925(c), the court found it appropriate to consider whether that conclusion remained persuasive in light of "the intervening passage of time and its effect." Pet. App. 4a. In the court's view, time had revealed

that "[t]his is not a case of mere agency delay in processing [respondent's] petition, it is complete preclusion of administrative remedies for an indefinite, possibly infinite, period of time." *Id.* 9a n.20. The court thus regarded "the intervening passage of time and the resulting reality of the effective non-temporary 'suspension' of statutorily created rights" as "a critical additional factor." *Id.* 9a.[1]

The Fifth Circuit emphasized that § 925(c) grants important and substantial rights to persons whose firearms privileges have been revoked. The court of appeals recognized this Court's holding that a finding that Congress indirectly abrogated statutory provisions through funding restrictions is "'especially disfavored.'" Pet. App. 7a (quoting *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992)). But even that stringent standard, the Fifth Circuit explained, is somewhat too lenient in this context because it arose from cases involving "purely financial rights that Congress then rescinded by expressly refusing to fund." *Id.* 8a n.19. Here, by contrast, the government is arguing that, rather than merely having "promis[ed] money then chang[ed] its mind and not making it available," Congress supposedly abrogated a substantive right. *Id.* 8a. "We must now conclude that merely refusing to allow the agency responsible for facilitating those rights to use appropriated funds to do its job under the statute is not the requisite direct and definite suspension or repeal of the subject rights." *Id.* 9a.

The Fifth Circuit separately affirmed the district court's decision that respondent was entitled to have his firearms privileges restored under § 925(c). *Id.* 9a-11a.

Having concluded that the district court properly granted respondent's application under § 925(c), the court of appeals left undisturbed the district court's separate holding "that

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[1] On this basis, the Fifth Circuit also concluded that respondent's "administrative remedies *de facto* were exhausted." Pet. App. 9a & n.20.

Bean's foreign conviction was not a predicate offense triggering the provisions of 18 U.S.C. § 922(g)(1)." Pet. App. 11a.

The Fifth Circuit denied the government's petition for rehearing *en banc* without a single member of the court calling for a vote.

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied for three reasons. *First*, any decision by this Court on the question presented would have no significance in this case because the district court ruled in respondent's favor on an independent ground that the Solicitor General explicitly acknowledges is not presented by the petition – *viz.*, that the facts and circumstances of the Mexican conviction do not trigger the firearms disability of § 922(g)(1). As the government itself made clear in its brief on appeal: "The district court concluded *alternatively* that plaintiff's foreign conviction could not serve as a predicate offense for loss of firearms privileges under 18 U.S.C. § 922(g)(1). *In the court's view, the federal firearms disabilities never attached.*" Gov't C.A. Br. 10 (emphasis added). *Second*, no other circuit has yet addressed the specific question decided by the Fifth Circuit: whether "the intervening passage of time and its effect" (Pet. App. 4a) undermine prior circuit precedent holding that judicial review is not available under 18 U.S.C. § 925(c). The *en banc* Third Circuit, however, will soon decide that question in an ideal vehicle to resolve any circuit conflict that might emerge (*Pontarelli* v. *ATF*, No. 00-1268 (argued Nov. 28, 2001)), and there is no reason that this Court must decide the question prior to the Third Circuit's decision. *Third*, the Solicitor General's principal argument – that the decision below misinterprets various statutes – is both irrelevant to the certiorari determination and also incorrect.

I. Certiorari should be denied because the question presented by the Solicitor General – whether respondent had a right to seek judicial review of the revocation of his firearms privileges pursuant to § 925(c) – is entirely academic in the context of this case.

a. The district court held that respondent's firearms privileges were never revoked because the Mexican conviction did not trigger § 922(g)(1). Pet. App. 31a-33a. Cf. *id.* 16a (district court's recitation that respondent's case separately raised the question "whether a foreign conviction may serve as the predicate offense for a prohibition of firearms privileges under 18 U.S.C. § 922(g)(1)"). That conclusion is further buttressed by the Texas court's entry, subsequent to the district court's decision, of a declaratory judgment that the state does not deem him a felon in light of the circumstances of the Mexican conviction. See *supra* at 6.

Certiorari should be denied because the district court's holding under § 922(g)(1) – which resolves this case entirely – is not raised by the petition. The Solicitor General framed the question presented by the petition so as not to encompass the proper construction of § 922(g)(1). See Pet. i. In addition, the petition explicitly states that the government is not raising that question. See *id.* 5 n.2. Because the district court's decision in this case establishes that respondent could not be charged with any offense under § 922(g)(1), respondent has no need to seek to have his firearm privileges "restored" under § 925(c), which is the only issue presented by the petition. Section 922(g)(1) is a self-executing federal criminal statute, which is enforced by charging the defendant as a felon in possession of firearms. See 18 U.S.C. § 922(g) ("It shall be unlawful for any person * * *."). Under the district court's holding, respondent simply could not be charged with a violation of § 922(g)(1).[2]

b. The petition contends that respondent conceded in the court of appeals that "his conviction in Mexico triggered fire-

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[2] For decisions discussing § 922(g)(1), see, *e.g.*, *Old Chief* v. *United States*, 519 U.S. 172, 174 (1997), and *Custis* v. *United States*, 511 U.S. 485, 487 (1994).

arms disabilities under 18 U.S.C. 922(g)(1)." See *id.* 5 n.2 (citing Resp. C.A. Br. 18). That contention is inaccurate, and it would be entirely counterintuitive to believe that respondent would have abandoned such an independent ground of decision that grants him all the relief he seeks. Respondent explicitly *embraced* the district court's holding, but argued that the government had misconstrued the district court's decision as having adopted a categorical rule that foreign convictions may never trigger § 922(g)(1), when in fact the district court had undertaken a nuanced analysis of the facts and circumstances surrounding the foreign conviction. See Resp. C.A. Br. 19. Respondent agreed with the district court's conclusion that, under such a case-by-case approach, he was not subject to a firearms disability:

> [The government] correctly cite[s] the dicta of two cases which indicate that further inquiry might be warranted to question foreign convictions where the facts demonstrate that the foreign conviction was the "result of the violation of the defendant's civil rights or contrary to any cherished principal [sic] of American constitutional law." *United States v. Atkins*, 872 F.2d 94, 95-6 (4th Cir. 1989), *cert. denied*, 493 U.S. 836 (1989); and, *United States v. Winson*, 793 F.2d 754 (6th Cir. 1986).
>
> As stated in Appellee's petition for relief and included in the evidence admitted at trial, Mexican law required Appellee to sign a statement prepared in Spanish, which Appellee could not understand and which Appellee later learned constituted a confession, which incriminated Appellee. R3, Tr. 13, 14. The right of an accused not to be required to make an incriminating statement against himself is certainly a cherished principal [sic] of American constitutional law, which the district court noted.

Id. 19-20.

In purporting to identify a concession by respondent in the Fifth Circuit, the government cites to a single clause in a single sentence in respondent's brief on appeal that just states his position in the *district court* before the district judge *sua sponte* decided the § 922(g)(1) question in respondent's favor. Plainly using the past tense, respondent's Fifth Circuit brief stated: "Appellee never *disputed* he was prohibited from possessing firearms under 18 U.S.C. § 922(g)(1) as a result of his foreign conviction * * *." Resp. C.A. Br. 18 (emphasis added). Moreover, that statement in respondent's appellate brief simply echoes the identical statement in the government's brief, which again was limited to respondent's position prior to the district court's decision: "Plaintiff never disputed that he was prohibited from possessing firearms under 18 U.S.C. § 922(g)(1) as a result of his felony conviction in Mexico. * * * * Without briefing or argument from either party, the district court *sua sponte* considered whether plaintiff's Mexican felony conviction could serve as a predicate offense for prohibition of firearms under § 922(g)(1)." Gov't C.A. Br. 17.

Any doubt on this score is resolved by the fact that the government expressly conceded below, and the Fifth Circuit agreed, that the district court's holding under § 922(g)(1) was an independent ground of decision. The government stated: "The district court concluded *alternatively* that plaintiff's foreign conviction could not serve as a predicate offense for loss of firearms privileges under 18 U.S.C. § 922(g)(1). *In the court's view, the federal firearms disabilities never attached.*" Gov't C.A. Br. 10 (emphasis added). See also *id.* 2 (separately appealing, as question three, "Whether the district court erred *in ruling* that plaintiff's foreign conviction *cannot serve as a predicate offense* for a prohibition of firearms privileges under § 922(g)(1)." (emphasis added)); *id.* 17-23 (extensive argument section separately contesting this holding). The court of appeals, in turn, acknowledged that the district court had separately held "that Bean's foreign conviction was not a predicate offense triggering the provisions of 18 U.S.C.

§ 922(g)(1)," and explicitly left that holding undisturbed. Pet. App. 11a.

In any event, it would make no difference if respondent *had* conceded for purposes of the proceedings in the Fifth Circuit that the Mexican conviction triggered § 922(g)(1), now that the Fifth Circuit has decided the case without adopting any such concession. The critical question is whether the district court's ruling establishes (as a matter of *res judicata* or otherwise) that respondent is not subject to § 922(g)(1) such that respondent has no need to resort to the provisions of § 925(c). That is a question of law that would be determined by a later court reviewing the district court's decision. Plainly, the better reading of the opinion is that the district court held that the Mexican conviction does not trigger § 922(g)(1). See *supra* at 3-4. Just as important, the government conceded that was the better reading in the Fifth Circuit and the court of appeals agreed. It would be nothing less than absurd for the government now to attempt to charge respondent criminally under § 922(g)(1).

Nor can the Solicitor General resuscitate the petition by retreating to the argument that the Fifth Circuit could address the application of § 922(g)(1) on remand. That argument would depend on two separate premises that have been *rejected* by the only courts to decide them – *i.e.*, that the government will prevail in its arguments under § 925(c) and also its arguments under § 922(g)(1). In other words, the government's position would have to be that a ruling by this Court could, conceivably, have a practical consequence if various contingencies occur. Not only does this Court ordinarily not grant certiorari to decide a question that is presented in such a hypothetical context, but leaving the application of § 922(g)(1) for proceedings on remand would require this Court to decide the question presented based on an artificial assumption: logically, the question whether an individual has had his firearms privileges revoked under § 922(g)(1) (on which respondent separately prevailed in the district court) is

antecedent to the question (presented by the petition) whether the individual must seek to have those privileges restored.[3]

c. The question presented by the Solicitor General is framed artificially, and thus is inappropriate for certiorari, in still another respect. After concluding that judicial review is available under § 925(c), the district court made factual findings, supported by extensive testimony, that respondent's firearms privileges should be restored because he indisputably presents no threat to the community. See *supra* at 5-6. The government unsuccessfully challenged that holding. See Gov't C.A. Br. 15-17; see also Pet. App. 9a-11a (rejecting those arguments). In this Court, the Solicitor General abandons those contentions. Although it no longer disputes that the district court correctly held that respondent is entitled to have his firearms privileges restored if judicial review is ever available under § 925(c), the government argues that district courts will endanger communities by restoring firearms privileges too freely. See Pet. 17. If that is a legitimate concern, it would be more appropriate for this Court to grant certiorari in a case in which the petitioner seeks review of both the question whether judicial review is available under § 925(c) and, if the answer to that question is yes, what the appropriate legal standard is. Otherwise, the Court may find it necessary to expend its resources in granting certiorari in two separate cases.

II. Certiorari also is not warranted because there is no circuit conflict over the specific question decided by the court of appeals in this case: whether "the intervening passage of time and its effect" (Pet. App. 4a) undermine prior circuit prece-

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[3] Furthermore, the Solicitor General has successfully opposed certiorari in innumerable cases on the ground that the lower courts' decisions rested on an independent ground not presented by the petition. It would be both surprising and noteworthy if the government announced here that the opposite view is correct.

dent holding that judicial review is not available under 18 U.S.C. § 925(c).

a. As the Solicitor General frankly acknowledges, "The Fifth Circuit in this case departed from [its prior decision in] *McGill* on the ground that 'we have a critical additional factor, the intervening passage of time and the resulting reality of the effective non-temporary 'suspension' of statutorily created rights.'" Pet. 15 (quoting Pet. App. 9a). The decision below is thus properly distinguished from decisions of other courts that considered, in previous years, whether Congress intended to suspend review of applications to restore firearms privileges temporarily. Thus, the Fifth Circuit held in 1996 that various budget bills had impliedly effected such a suspension (see *United States* v. *McGill*, *supra*, 74 F.3d 64) but held five years later in this case that the passage of time demonstrated that Congress had merely intended to conserve resources by preventing *ATF* (as opposed to the courts) from considering such applications (see Pet. App. 4a). Indeed, no member of the Fifth Circuit called for a vote on the government's petition for rehearing *en banc* in this case, including any of the Fifth Circuit judges who ruled in the government's favor in that court's previous decision in *McGill* or who subsequently affirmed a district court's holding that it lacked jurisdiction under *McGill* (see *Kostmayer* v. *Department of Treasury*, No. 98-30355 (Apr. 9, 1999) (order), *cert. denied*, 528 U.S. 928 (1999)).

The question whether the passage of time undermines the inference created by congressional suspension of ATF's funding with respect to § 925(c) has not yet been considered by any other court of appeals. When those courts do consider the issue, there is every reason to believe that they will agree with the Fifth Circuit's decision in this case. The passage of time is tied directly to the question whether an application as a result of funding suspension has been "denied," thereby triggering access to judicial review under § 925(c), when funding restrictions cause ATF to refuse to act on the application. Although a relatively short delay in considering the application is arguably not a "denial," it has now become clear that Congress has imposed an effectively permanent suspension of funding and that all applications to ATF are being at least "constructively denied" rather than merely deferred. Thus, although the Fourth Circuit has held in denying relief under § 925(c) that an applicant could not claim a "constructive denial" when "the agency has not acted for only a relatively short period of time" (*Saccacio* v. *ATF*, 211 F.3d 102, 104 (2000)), that conclusion does not preclude a later determination by that court and other circuits that the funding restriction has become permanent, such that applicants are entitled to judicial review on the basis of the constructive denial of their applications.

Not only should this Court's consideration of the question decided by the Fifth Circuit in this case await a ruling on that issue by at least one other circuit to see if a conflict develops, but such a ruling is in fact imminent. On November 28, the *en banc* Third Circuit heard oral argument in a case that presents the question whether that court should follow the Fifth Circuit's decision in this case and adhere to its prior precedent in *Rice* v. *United States*, 68 F.3d 702 (1995), or instead should hold that judicial review is not available under § 925(c). *Pontarelli* v. *ATF*, No. 00-1268. Prior to oral argument, the Third Circuit specifically directed the parties to submit supplemental briefs addressing the Fifth Circuit's decision in this case. The Third Circuit's decision in *Pontarelli* will accordingly provide this Court with substantial guidance regarding whether the circuits will reach a common understanding on the application of § 925(c). *Pontarelli* will also provide this Court with the opportunity to resolve any circuit conflict that might emerge because the applicant in *Pontarelli* will certainly seek certiorari if the Third Circuit declines to follow the Fifth Circuit's decision in this case.

b. The Solicitor General offers no persuasive reason to conclude that the question presented by the petition so ur-

gently requires resolution that it would be inappropriate to await the Third Circuit's decision in *Pontarelli*. To be sure, the petition paints an eye-catching image of federal district judges dispensing gun permits like candy to tens of thousands of marauding Texas felons. See Pet. 16, 17. But that hyperbolic claim is provably false. Texas no doubt has its fair share of felons, but so do the states within the Third Circuit, which since 1995 has permitted district courts to grant precisely the relief that the Fifth Circuit authorized here. Through print and electronic resources, respondent has been able to identify only *three* individuals who filed such an application in district courts in the Third Circuit in that entire six-year period: Philip Rice (see *Rice* v. *United States*, No. 93-6107, 1997 U.S. Dist. LEXIS 1126 (E.D. Pa. Jan. 31, 1997) (application granted)); Louis Pontarelli (see *Pontarelli* v. *United States Dep't of the Treasury*, No. 98-5081, 2000 U.S. Dist. LEXIS 2702 (E.D. Pa. Mar. 10, 2000) (application granted), *appeal pending*, CA3 No. 00-1268); and Jerome Palma (see *Palma* v. *United States*, 228 F.3d 323 (CA3 2000) (application denied)). That was precisely the point made by the Solicitor General in opposing certiorari in *McGill*: "we are informed that no felon has yet obtained relief from a district court in [the Third Circuit], and that no applications for relief are currently pending before district courts there (other than the application in *Rice* itself)." U.S. BIO, No. 95-2015, *McGill* v. *United States* 11.

Any contention by the government that the question presented requires immediate resolution would also stand in considerable tension with the Solicitor General's argument successfully made in opposition to petitions that sought to resolve the conflict between the Fifth Circuit's decision in *McGill* and the Third Circuit's decision in *Rice*, that the conflict was tolerable. In *McGill*, the Solicitor General advised this Court to wait until the Third Circuit has the opportunity to "reconsider its decision in *Rice*," which is precisely what will occur in the pending *Pontarelli* case. U.S. BIO, No. 95-2015, *McGill* v. *United States* 11. See also U.S. BIO, No. 99-

71, *Kostmayer* v. *Department of Treasury* 8 n.4 (adhering to position expressed in *McGill* BIO).

Finally, the Solicitor General greatly overstates the significance of any divergence in the circuits' interpretation of § 925(c). The Third and Fifth Circuits hold that district courts may grant relief from firearms disabilities only in the most extraordinary circumstances. The Third Circuit holds that an individual is not even entitled to produce evidence in support of his application unless he first establishes, as a "threshold" matter, that the failure to restore his firearms privileges would constitute a "miscarriage of justice." *Palma* v. *United States*, 228 F.3d 323, 329 (2000). "Then, and only then, can the district court receive such evidence and consider it in determining whether the applicant satisfies the other requirements of § 925(c) – *i.e.*, whether the applicant will not be likely to act in a manner dangerous to public safety and that the granting of relief would not be contrary to the public interest. " *Id.* Similarly, in this case, the Fifth Circuit held that respondent was entitled to have his firearms privileges restored only because of the extraordinary facts of his case. See *supra* at 6. It will be a rare case in which an applicant will successfully petition to have his firearms privileges restored under that stringent standard.

III. The government addresses the supposed circuit conflict presented by the petition in only three paragraphs (see Pet. 8-9), then spends eight pages attempting to establish that the Fifth Circuit's decision misconstrues Congress' intent (see *id.* 9-16). But these arguments on the merits amount to nothing more than a request for error correction because the Solicitor General cannot, and does not, contend that the decision below conflicts with this Court's precedents. In any event, the government's arguments are simply wrong for the reasons described by the lower courts but ignored by the petition.

a. The petition argues first (at 10) that annual funding restrictions unambiguously express Congress' intent to impliedly repeal ATF's authority to act on § 925(c) applications.

For each of the past several years, Congress has provided that "none of the funds appropriated herein [*i.e.*, to ATF] shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. § 925(c)." *E.g.*, Pub. L. No. 102-393, 106 Stat. 1732 (1992). But it does not necessarily follow that Congress implicitly intended to preclude judicial review. Moreover, the funding restrictions do not necessarily imply that Congress intended to forbid *even ATF* from acting. As the Fifth Circuit explained, this Court's decisions grudgingly finding implied repeals on the basis of funding restrictions involve Congress "promising money then changing its mind and not making it available." Pet. App. 8a. Here, by contrast, the implied repeal would be of a *substantive right* and the agency could separately secure the funds in another way. In particular, ATF could charge an applicant a fee that would cover the costs of its investigation. Cf. Pet. App. 23a (district court's conclusion that ATF spent an average of $3700 per investigation).

b. The Solicitor General next argues that four aspects of the statutory scheme establish Congress' intent to impliedly repeal the judicial review provision of § 925(c). See Pet. 11-16. But this Court's precedents reject the logic underlying the government's argument – *i.e.*, that Congress will be held to have impliedly repealed substantive law through inferences piled upon top of still other inferences. The already "strongly disfavored" inference that Congress intended funding restrictions on ATF to repeal *that agency's* authority to act on § 925(c) applications (see *Johnson* v. *Robison*, 415 U.S. 361, 373-74 (1974)) is stretched past the breaking point when invoked to establish that Congress impliedly intended to repeal the *judiciary's* authority to act as well. Federal law expressly provides: "Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial." 18 U.S.C. § 925(c). Congress did not repeal that provision and did not take any direct step to preclude judicial review. So long as the judicial

review provision of § 925(c) can be rationalized with ATF's refusal to act on applications – and it can – the Fifth Circuit's decision is correct on the merits. Any other result would require this Court to discard the first principle of statutory construction: that the plain statutory language controls. See Pet. App. 26a (citing *Norfolk & W. Ry. Co.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 128 (1991); *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 557-58 (1990)).

1. The government's principal argument is that § 925(c)'s judicial review provision is *per se* ineffective unless and until ATF acts on an application because the statute predicates judicial review upon the application first being "denied" by ATF. See Pet. 11-12. But ATF's categorical refusal to act on an application – whether voluntarily or as a result of a funding restriction – constitutes a "denial." As the dictionary definition quoted by the petition makes clear, a "denial" is not limited to an affirmative "rejection" but also includes a "'refusal to grant'" the requested relief. Pet. 12 (quoting *Webster's Third Int'l Dict.* 602 (1993)).

Here, ATF conclusively stated that it would not act on respondent's application and thereby "refus[ed] to grant" the application. On the government's contrary view, an individual could not seek judicial review if ATF were authorized to expend funds on § 925(c) applications but categorically refused to do so, because the agency's refusal to act would never constitute a "denial." Congress could not have intended the statute to operate in that way.

The government's argument is also refuted by its own contention (Pet. 12) that judicial review under § 925(c) is subject to the Administrative Procedure Act ("APA"). Assuming that is correct, then ATF's refusal to act suffices to permit an applicant to proceed to court. The APA explicitly renders an agency's "failure to act" subject to judicial review. 5 U.S.C. § 551(13) ("'agency action' includes * * * failure to act"); *id.* § 702 ("A person suffering legal wrong because of agency

action, or adversely affected or aggrieved by agency action * * * is entitled to judicial review thereof."). Because § 925(c) explicitly provides a mechanism for an applicant to seek review in court, this is a case in which Congress "has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion," such that ATF's inaction is subject to judicial review. *Heckler* v. *Chaney*, 470 U.S. 821, 834-35 (1985).

2. The government's next argument is that the APA renders a court powerless to provide an applicant any relief under § 925(c). See Pet. 13. The Solicitor General acknowledges that a court may declare the refusal to grant relief to be "unlawful." But the government contends that ATF's action cannot be deemed "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance *with law*'" because ATF has acted in accordance with the funding restrictions placed upon it. *Id.* (quoting 5 U.S.C. § 706(2)(A) (emphasis added)). But the relevant "law" for these purposes has to be the substantive standard for restoring firearms privileges, not the appropriations statutes governing ATF. On the government's alternative view, a district court could never overturn ATF's refusal to grant relief under § 925(c) if ATF had properly investigated, or refused to investigate, the application in accordance with all relevant *funding* legislation, even if its substantive decision ran totally contrary to the statutory standard for granting relief. That cannot be right. At the very least, given that respondent's reading of § 925(c) is a reasonable one, the funding provisions identified by the government do not provide the clear and convincing proof required by this Court's precedents to establish that Congress intended to implicitly suspend the statute's judicial review provision.

3. The government next argues that the Fifth Circuit's decision conflicts with what it describes as "Congress's stated reasons for suspending ATF's authority," including particularly to prevent *any* person from having his firearms privileges restored. Pet. 13-14. But that supposed "reason" for preventing ATF from acting on applications is not "stated" anywhere in the statute, which unambiguously grants a right of judicial review. Fidelity to plain meaning is, in fact, the foundation of this Court's holdings that repeals by implication are strongly disfavored (see, *e.g.*, *Johnson* v. *Robison*, *supra*, 415 U.S. at 373-74) and that funding restrictions will be deemed to repeal substantive law only upon a clear and convincing showing of congressional intent (see, *e.g.*, *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992)). Given that Congress is made up of many individuals, who seldom agree as a whole, the views of the few members who considered the legislative history quoted in the petition cannot trump the unambiguous language of § 925(c) enacted by the Congress as a whole.

Furthermore, the inference that the government attempts to draw from the legislative history could not be weaker. Its position rests on a single sentence in a 1992 Senate Report and two sentences in a 1995 House Report. See Pet. 3-4. Neither of those references so much as mentions suspending judicial review. Moreover, the district court, having "diligently searched the legislative history," correctly concluded that it contains only "many contradictory statements." Pet. App. 20a. The best reading of the legislative history is "that Congress withheld funding to the ATF for *economic reasons*, not because they intended outright suspension of relief for worthy individuals." *Id.* 24a.

Just as important, even assuming that the brief references invoked by the government had any persuasive force at all with respect to the appropriations bills they discussed, they certainly do not have that force when interpreting *different* appropriations statutes enacted in *later years*. If "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress" (*Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotation marks omitted)), then prior legislative history *a fortiori* offers little

or no guidance with respect to a bill that was not enacted until years later. The government's contention that members of Congress, in enacting ATF's 1999 appropriation (the relevant year for purposes of this case), had in mind (much less implicitly intended to endorse) three sentences from congressional reports issued many years before is totally implausible.

The district court also correctly rejected the suggestion that Congress intended to prevent felons from having their firearms privileges restored. See Pet. App. 24a-26a. The broader statutory scheme makes clear that Congress could not have been pursuing that goal. Under 18 U.S.C. § 921(a)(20), a state felon's federal firearms privileges are restored by an array of state-law procedures, including "pardons, expungements, and restorations of civil rights." Pet. App. 24a-25a. Indeed, "'many states restore civil rights to convicted felons by means of a general law stating that all rights shall be reinstated upon the service of a sentence'" or "after a given period of time following sentence or parole." *Id.* 25a (quoting *McGrath* v. *United States*, 60 F.3d 1005, 1008 (CA2 1995)).

4. The government's final argument is that district judges are ill-equipped to determine whether an individual is entitled to have his firearms privileges restored. See Pet. 13-15. As to the factual determination to be made – whether the individual represents a danger to the community – that is obviously wrong: on a daily basis, district judges make more difficult factual determinations in far weightier circumstances. Cf. *Hilton* v. *Braunskill*, 481 U.S. 770, 777 (1987) (in determining whether to release successful habeas petitioner pending final determination of case, court may consider, *inter alia*, "risk that the prisoner will pose a danger to the public"); *United States* v. *Salerno*, 481 U.S. 739, 751 (1987) (upholding constitutionality of provision of Bail Reform Act of 1984, pursuant to which courts evaluate, *inter alia*, likelihood of future dangerousness). District judges are also perfectly capable of requiring the applicant to produce an array of witnesses and documentary evidence – co-extensive with the fac-

tual inquiry that ATF makes in its field investigations. In court, ATF has the power to subpoena its own witnesses to appear and to testify, as well as to conduct discovery from the applicant and to cross-examine witnesses. Indeed, the in-person, adversarial format of a court hearing is ideally suited to credibility determinations. If the district court is not fully satisfied with the evidence presented, it can and will deny the application or require the applicant to conduct additional investigative work. And, as the district court concluded in this case, the applicant would bear all the costs of this process. See Pet. App. 28-29a.

At bottom, the government's real argument is that district judges should grant relief under § 925(c) only when the applicant has made an extraordinary factual showing. That point just illustrates that this case is an inappropriate certiorari vehicle because the Solicitor General no longer disputes that the record developed by the district court in this case conclusively demonstrates that respondent is entitled to relief under the statute. See *supra* at 12-13. The evidence in support of respondent's application was supplied by the same individuals ATF would have contacted in its field investigation, as well as from local law enforcement and judicial officials who were personally familiar with respondent's reputation and character. The district court ultimately granted respondent relief because, unlike the applicants in any of the other cases cited by the government, he (i) was convicted in another nation based on an innocent and inadvertent act by a third party and after he was deprived of basic constitutional rights, (ii) is a respected member of his community, (iii) presents no danger at all to the community (as numerous credible and objective witnesses testified), and (iv) suffered the loss of his livelihood as a firearms dealer. As the Fifth Circuit concluded, it is "beyond peradventure to believe that Congress, or those seeking to rescind § 925(c), intended for someone like Bean to lose his livelihood on the basis of the facts such as are before us." Pet. App. 11a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 26, 2001

(3)

No. 01-704

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

THOMAS LAMAR BEAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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THOMAS LAMAR BEAN

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REPLY BRIEF FOR THE PETITIONERS

A. Respondent's Foreign Conviction Furnishes No Reason To Deny Review Of The Question Presented

Respondent contends (Br. in Opp. 8-13) that review of the question whether a district court has authority to remove federal firearms disabilities is unwarranted because the district court ruled in respondent's favor on the alternative ground that respondent's foreign conviction did not trigger firearms disabilities in the first place. Even if we assume that the district court ruled in respondent's favor on that alternative ground, it would not affect the propriety of granting review on the question presented in the government's petition. The Fifth Circuit ruled in respondent's favor solely on the ground that a district court has authority to remove firearms disabilities, and that holding conflicts with the decisions of five other circuits. See p. 6, *infra*. The

Fifth Circuit expressly refrained from deciding whether respondent's conviction triggered firearms disabilities. Pet. App. 11a. In these circumstances, the government appropriately limited its petition to the question whether a district court has authority to remove federal firearms disabilities, and that question plainly warrants this Court's review.

At least twice within the past year, the Court has granted petitions in similar circumstances. In *Ashcroft* v. *ACLU*, cert. granted, 121 S. Ct. 1997 (2001) (No. 00-1293), the district court granted a preliminary injunction against the enforcement of the Child Online Protection Act (COPA) on the grounds that it may impose a significant burden on speech and there may be less restrictive alternatives to further the interests underlying the Act. Pet. App. at 40a-100a, *Ashcroft* v. *ACLU*, *supra* (No. 00-1293). Without addressing those issues, the court of appeals affirmed the preliminary injunction on the ground that COPA's reliance on "community standards" violates the First Amendment. *Id.* at 1a-39a. The government's petition raised only the question whether COPA's reliance on community standards violates the First Amendment, Pet. at I, *Ashcroft* v. *ACLU*, *supra* (No. 00-1293), Pet. (I), and this Court granted the petition for a writ of certiorari, 121 S. Ct. 1997 (2001).

In *Edelman* v. *Lynchburg College*, cert. granted, 121 S. Ct. 2547 (2001) (No. 00-1072), a letter alleging discrimination was filed with the Equal Employment Opportunity Commission (EEOC) within Title VII's statute-of-limitations period, but was not verified until after the limitations period expired. Under the EEOC's regulations, verification of an otherwise timely charge relates back to the date on which the charge was filed. The district court dismissed the complaint on the

ground that neither the plaintiff nor the EEOC had treated the plaintiff's letter as a timely charge. Pet. App. at 16a-25a, *Edelman* v. *Lynchburg College*, *supra*, (No. 00-1072). Without reaching the ground relied upon by the district court, the court of appeals affirmed the dismissal on the ground that the EEOC's relation-back regulation is invalid. *Id.* at 1a-15a. This Court granted certiorari, limiting the question presented to the validity of the EEOC's relation-back regulation. 121 S. Ct. 2547 (2001).

Ashcroft v. *ACLU* and *Edelman* v. *Lynchburg College* demonstrate that when an issue resolved by a court of appeals warrants review, the existence of a potential alternative ground relied upon by the district court, but not addressed by the court of appeals, is not a barrier to such review.

Respondent's foreign conviction poses even less of an obstacle to review than the alternative grounds at issue in *Ashcroft* v. *ACLU* and *Edelman* v. *Lynchburg College* because respondent conceded in both the district court and the court of appeals that his foreign conviction triggered firearms disabilities. Respondent asserts (Br. in Opp. 9-11) that he conceded that point only in the district court, but his concession in the court of appeals could not have been clearer. Argument III in respondent's court of appeals brief is captioned: "Appellee's Foreign Conviction is a Predicate Offense for Federal Firearms Disabilities under 18 U.S.C. 922(g)(1)." C.A. Br. 18.

Nor is it even clear that the district court "held" otherwise. Br. in Opp. 9. In one part of its opinion, the district court stated that "[t]his case is a perfect illustration as to why the phrase 'any court' in 18 U.S.C. 922(g)(1) cannot be interpreted to mean 'any court in the world regardless of the severity of the crime or the

due process to which the defendant was entitled during the defense of his case." Pet. App. 32a-33a. On the other hand, the district court stated in another part of its opinion that "[d]ue to this Mexican conviction (and despite the termination of supervised release), [respondent] could not own or possess a firearm". *Id.* at 14a. Furthermore, the district court's judgment does not declare that respondent was not under firearms disabilities to begin with because his foreign conviction did not trigger 18 U.S.C. 922(g)(1). Rather, it specifies that respondent "is hereby granted relief from all disabilities imposed by Federal laws * * * resulting from his foreign conviction on May 27, 1998." Pet. App. at 37a-38a. Thus, while the district court expressed serious misgivings about treating respondent's conviction as a predicate offense, it ultimately did just that.

In his appellee's brief, respondent offered precisely that interpretation of the district court's opinion, arguing that "[w]hile the district court's comments are strongly worded, it is obvious from the judgement [*sic*] in this case that the district court recognized [the] disabilities [flowing from the foreign conviction]." C.A. Br. 20. Because the district court's opinion could be read to rest on the alternative ground that respondent's conviction did not trigger firearms disabilities, the government, out of an abundance of caution, raised that issue in its opening brief on appeal. Gov't C.A. Br. 2, 17-23. After respondent conceded in his appellee's brief that his conviction triggered firearms disabilities and that the district court's judgment recognized those disabilities, the government accepted those concessions in its reply brief, effectively removing that issue from the case. Gov't C.A. Reply Br. 8-9.

Whether or not that issue concerning respondent's foreign conviction was properly raised in this case or

remains in the case at this stage, however, it furnishes no reason for this Court to deny review of the sole question resolved by the court of appeals and presented by the government's certiorari petition—whether a district court has authority to remove federal firearms disabilities. If the Court decides that issue in the government's favor, the Court may then remand the case to the court of appeals to consider any issue that was properly raised and legitimately remains concerning the significance of respondent's foreign conviction. *Glover* v. *United States*, 531 U.S. 198, 205 (2001); *Bailey* v. *United States*, 516 U.S. 137, 151 (1995).[1]

B. The Fifth Circuit's Decision Conflicts With Decisions Of Five Other Circuits

Respondent contends (Br. in Opp. 13-15) that the Fifth Circuit's decision does not conflict with a decision of any other circuit. In fact, however, the Fifth Circuit's holding that a district court has authority to remove federal firearms disabilities conflicts with the decisions of five other circuits. *Mullis* v. *United States*, 230 F.3d 215, 219-221 (6th Cir. 2000); *McHugh* v. *Rubin*, 220 F.3d 53, 57-61 (2d Cir. 2000); *Saccacio* v. *ATF*, 211 F.3d 102, 104-105 (4th Cir. 2000); *Owen* v. *Magaw*, 122 F.3d 1350, 1353-1354 (10th Cir. 1997). *Burtch* v. *United*

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[1] The government's failure to include in its petition an additional issue concerning the legal standard a district court should apply in deciding whether to remove federal firearms disabilities also furnishes no reason to deny review of the question it did present. If the Court agrees with the government and five circuits that a district court lacks authority to remove federal firearms disabilities, the question of what standard a district court should use to decide whether to remove firearms disabilities simply does not arise.

States Dep't of the Treasury, 120 F.3d 1087, 1090 (9th Cir. 1997).

Respondent asserts (Br. in Opp. 14) that there is no conflict because the Fifth Circuit based its decision on the passage of time since its decision in *United States* v. *McGill*, 74 F.3d 64, cert. denied, 519 U.S. 821 (1996). But the five circuits holding that a district court lacks authority to remove federal firearms disabilities based their decisions on reasoning that could not be affected by the passage of time since *McGill*. In particular, those circuits reasoned that (1) the relevant text included in each ATF appropriations statute since 1992 unequivocally prohibits ATF from investigating or acting upon applications, *Mullis*, 230 F.3d at 217-218; *McHugh*, 220 F.3d at 58; (2) the judicial review provision in 18 U.S.C. 925(c) is not triggered by a refusal to act, but instead requires an ATF rejection of an application on the merits, *Mullis*, 230 F.3d at 219; *McHugh*, 220 F.3d at 60-61; *Saccacio*, 211 F.3d at 104; *Owen*, 122 F.3d at 1354; *Burtch*, 120 F.3d at 1090; and (3) ATF's decision to adhere to a congressional directive not to process applications is not subject to challenge under the Administrative Procedure Act (APA) as action that is unreasonably withheld, or arbitrary, capricious, or not otherwise in accordance with law, *Mullis*, 230 F.3d at 219; *McHugh*, 220 F.3d at 61. Because the language in ATF's appropriations statute, the judicial review provision in Section 925(c), and the APA have not changed since *McGill*, the passage of time since that decision could not cause the five circuits that have held that a district court lacks authority to remove federal firearms disabilities to reconsider their holdings.

Respondent's reliance on the passage of time since *McGill* is a particularly unpersuasive basis for distinguishing the three most recent court of appeals decisions. Each of those decisions was issued more than four years after *McGill*, and, like the Fifth Circuit's decision in this case, each considered the effect of eight successive appropriations statutes barring ATF from processing applications for removal of federal firearms disabilities. Compare *Mullis*, 230 F.3d at 217 n.1; *McHugh*, 220 F.3d at 57 n.1; and *Saccacio*, 211 F.3d at 103-104, with Pet. App. 6a. n.11.

Because the conflict between the Fifth Circuit and five other circuits is ripe for resolution by this Court, there is no reason to await the Third Circuit's en banc decision in *Pontarelli* v. *ATF*, No. 00-1268. See Br. in Opp. 15. That decision cannot resolve the conflict that presently exists between the Fifth Circuit and five other circuits; that conflict will remain regardless of how the Third Circuit rules. Nor is there any guarantee that the Third Circuit's decision will be issued in the near future, or that the complaining party will seek Supreme Court review if the Third Circuit rules against him. The Fifth Circuit's decision squarely presents the question that divides the circuits and is an appropriate vehicle for resolving that recurring issue without undue delay.[2]

---

[2] The government urged the Court to deny review in *McGill*, despite the conflict between that decision and the Third Circuit's decision in *Rice* v. *United States*, 68 F.3d 702 (1995). But at that time, only two courts of appeals had addressed the issue, and the government anticipated that all the circuits, including the Third Circuit, would eventually agree with the holding in *McGill*, eliminating any need for this Court's intervention. Unlike the situation at the time of *McGill*, six circuits have now resolved the issue, and there is no realistic possibility that the conflict between the Fifth Circuit and the other five circuits can be resolved except by a decision from this Court.

C. The Fifth Circuit's Decision Is Incorrect

Respondent also seeks to defend (Br. in Opp. 18-23) the Fifth Circuit's holding that a district court has authority to remove federal firearms disabilities. Regardless of the merits of the Fifth Circuit's holding, review is warranted in order to resolve the conflict in the circuits on that issue.

In any event, respondent's defense of the Fifth Circuit's holding is unpersuasive. Respondent first argues (Br. in Opp. 18) that the appropriations statute does not even remove ATF's authority to process applications for removal of firearms disabilities, an argument that no court, including the Fifth Circuit, has ever adopted. Congress could not have more clearly prohibited ATF from acting on applications to remove firearms disabilities. In every ATF appropriations statute passed since 1992, Congress has provided that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." Pet. 3 & n.1.

Respondent contends (Br. in Opp. 18) that ATF could avoid that statutory bar by collecting fees from applicants and using the proceeds to investigate and process applications. But under federal law, any fees collected by ATF would have to be deposited in the Treasury, 31 U.S.C. 3302(b), and, under the Appropriations Clause, Article I, Section 9, Clause 7, and the Anti-Deficiency Act, 31 U.S.C. 1341, money may not be drawn from the Treasury unless it has been appropriated by an Act of Congress. See *OPM* v. *Richmond*, 496 U.S. 414 (1990). ATF therefore may not use fees collected from applicants to circumvent Congress's appropriations bar.

Respondent also argues (Br. in Opp. 18) that a court may remove firearms disabilities even if ATF may not

because the appropriations statute does not impliedly repeal the judicial review provision in Section 925(c). The absence of such a repeal, however, is beside the point. Section 925(c) does not confer any independent jurisdiction on federal courts to grant relief from firearms disabilities on a de novo basis. It provides only for "judicial review" of action by ATF. The statutory bar to ATF's taking that action removes the essential prerequisite for judicial review, and leaves no role for the courts to play.

Specifically, judicial review is available under Section 925(c) only when ATF issues a "denial" of an application. Because the appropriations statute prevents ATF from "act[ing]" on an application at all, and therefore from either granting or denying an application, the appropriations statute removes the essential predicate for judicial review under Section 925(c)—an ATF "denial" of an application. Moreover, the scope of judicial review under Section 925(c) is governed by the APA, 5 U.S.C. 706, and ATF's appropriations statute eliminates any basis for setting aside ATF's refusal to process applications under APA standards. Compliance with a statutory directive not to investigate or act upon applications cannot be set aside as agency action "unlawfully withheld or unreasonably delayed," 5 U.S.C. 706(1), or as "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law," 5 U.S.C. 706(2)(A).

* * * * *

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JANUARY 2002

(10)

Supreme Court, U.S.
FILED
APR 15 2002
OFFICE OF THE CLERK

No. 01-704

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS LAMAR BEAN, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

THEODORE B. OLSON *
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PETITION FOR WRIT OF CERTIORARI FILED: NOV. 11, 2001
CERTIORARI GRANTED: JAN. 2, 2002

62 pp

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

Docket No. 99-CV-724

THOMAS LAMAR BEAN, PETITIONER

v.

BUREAU OF ALCOHOL TOBACCO AND FIREARMS, ET AL., RESPONDENTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
11/4/99	1	Petition by pla for relief from disabilities under Federal Firearms Act (bst)
	* * * * *	
12/6/99	3	ORDER, that the court names the USA and the Bureau of Alcohol Tobacco and Firearms as respondents to this matter and sets this matter for a hearing on Jan 6, 2000 at 10:00 am. Parties encouraged to file supporting briefs on or before 12/30/99. (signed by Judge Joe J. Fisher) cc: parties of record 12/6/99 (fxc)

DATE	DOCKET NUMBER	PROCEEDINGS
12/27/99	4	Trial Brief filed by Thomas Lamar Bean (fxc)
12/29/99	5	MOTION by USA to dismiss petition for relief from disabilities under federal firearms act and to deny hearing of merits of petition (fxc)
	* * * * *	
1/20/00	—	Hearing held before Judge Joe J. Fisher on Plaintiff's Petition from Disabilities under Federal Firearm Act. Court takes the matter under advisement, and gives the parties until 1/28/2000 to submit proposed findings of fact and conclusions of law along with proposed judgments, and given until 2/4/2000 to file responses. (om)
	* * * * *	
1/20/00	9	Pretrial Statement of Nature of Case. (om) [Entry date 01/21/00]

DATE	DOCKET NUMBER	PROCEEDINGS
2/9/00	10	OBJECTIONS by USA to petitioner's proposed findings of fact and conclusion of law (fxc) [Entry date 02/10/00]
	* * * * *	
2/11/00	—	Proposed Findings of fact and conclusions of law submitted by Thomas Bean (fxc) [Entry date 02/14/00]
2/11/00	12	Response by Thomas Lamar Bean to [10-1] objection to petitioner's proposed conclusions of law (fxc) [Entry date 02/14/00]
2/11/00	—	Additional Findings of fact and conclusions of law by Thomas Bean (fxc) [Entry date 02/14/00]
	* * * * *	

DATE	DOCKET NUMBER	PROCEEDINGS
2/22/00	14	Memorandum Opinion that Mr. Bean's petition for relief from disabilities under the Federal Firearms Act is to be granted. A separate order will be entered. (signed by Judge Joe J. Fisher) cc: attys 2/23/00 (fxc) [Entry date 02/23/00]
2/22/00	15	ORDER in accordance w/ memorandum opinion it is ordered in accordance with 18 USC Sec 925(c) that petitioner is granted relief from all disabilities imposed by Federal laws with respect to petitioner's acquisition, receipt, transfer, shipment, transportation or possesion of firearms resulting from his foreign conviction on May 27, 1998 in Nuevo, Tamaulipas, Republic of Mexio (signed by Judge Joe J. Fisher 9/22/00) cc: attys 2/23/00 (fxc) [Entry date 02/23/00]

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
3/22/00	20	Notice of appeal by USA of [15-1] order. * * *

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Docket No. 00-40304

THOMAS LAMAR BEAN, PETITIONER-APPELLEE

v.

BUREAU OF ALCOHOL TOBACCO AND FIREARMS, ET AL., RESPONDENTS-APPELLANTS

DOCKET ENTRIES

DATE	PROCEEDINGS
3/28/00	US civil case docketed. NOA filed by Appellant Bur of Alcohol, Toba, Appellant USA. [00-40304] (kkf)
	* * * * *
6/29/00	Appellant's Brief filed by Appellant Bur of Alcohol, Toba, Appellant USA. * * *
	* * * * *
8/3/00	Appellee's Brief filed by Appellee Thomas Lamar Bean. * * *
	* * * * *
8/25/00	Reply brief filed by Appellant Bur of Alcohol, Toba, Appellant USA. * * *
	* * * * *

DATE	DOCKET ENTRIES
2/6/01	Oral argument heard. * * *
	* * * * *
6/20/01	Opinion filed. * * *
6/20/01	Judgment entered and filed. [00-40304] (ymn)
8/3/01	Petition filed by Appellant Bur of Alcohol, Toba, Appellant USA for rehearing. * * *
8/3/01	Petition filed by Appellant Bur of Alcohol, Toba, Appellant USA for rehearing en banc. * * *
8/21/01	COURT Order filed denying petition for rehearing [3299768-1], denying petition for rehearing en banc [3299777-1] * * *
8/29/01	Mandate issued. * * *
	* * * * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Case No. 1:99CV-724

EX PARTE THOMAS LAMAR BEAN

[Filed Nov. 4, 1999]

PETITION FOR RELIEF FROM DISABILITIES UNDER FEDERAL FIREARMS ACT

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now THOMAS LAMAR BEAN, Petitioner in the above entitled and numbered cause of action, and files this petition for relief from disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation and possession of firearms pursuant to 18 U.S.C. §925(c), and in support thereof would show unto the Court as follows:

1.

Petitioner is a resident of Orange County, Texas, in the Eastern District of Texas. Petitioner is sixty (60) years of age, has been married to his only wife, Sara Bean, since May 25, 1962, and has two adult children, Cory L. Bean and Julie L. Lightfoot. Petitioner was a licensed firearms dealer, License No. 5-76-181-01-9C-35798, at the time of the foreign offense the subject of this petition.

CIRCUMSTANCES OF FOREIGN OFFENSE

2.

Petitioner was attending a gun show as a dealer in Laredo, Texas, accompanied by his assistants, Arthur Craig Pulliam, Kevin Anthony Lee, and his son, Justin Lee. On Saturday, March 14, 1998, at the conclusion of the gun show, Mr. Bean and his assistants decided to have dinner at a restaurant in Nuevo Laredo. Justin Lee was instructed to remove the various weapons and ammunition stored in Mr. Bean's 1994 Suburban. Unfortunately, Justin Lee removed all of the weapons, but only some of the ammunition, leaving the following ammunition in plain view in the back of the Suburban, to-wit:

100 rounds of	Smith & Wesson.	40 caliber
100 rounds of	CCI	.22 caliber
6 live rounds	Remington	.223 caliber
and 14 spent casings		

3.

Mr. Bean, Kevin Anthony Lee, and Arthur Craig Pulliam did not see the ammunition left in the Suburban, and on March 14, 1998, Mr. Bean's vehicle was stopped at the Mexican Port of Entry, Nuevo Laredo, Tamaulipas, Mexico, where the ammunition in plain view was discovered by the Mexican officials. All four individuals were arrested. Justin Lee was released later that evening because he was a juvenile. Kevin Anthony Lee and Arthur Craig Pulliam were later released, but Thomas Lamar Bean was charged with introduction of ammunition into the Republic of Mexico since he was the owner of the vehicle and the ammunition.

4.

Mexican law required an accused to furnish a statement regarding the crime charged, even if the statement is incriminating. The arrested person can be charged with a separate offense should the arrested person fail to make such statement. Mr. Bean acknowledged that he was carrying the ammunition, was not aware that the ammunition was in the vehicle, was not aware that possession of ammunition was an offense in the Republic of Mexico, that the ammunition was not hidden but in plain view, and that the ammunition was in his Suburban as a part of the inventory he was selling at the gun show in Laredo, Texas.

5.

Petitioner, Thomas Lamar Bean, was sentenced on May 27, 1998, to a term of imprisonment of 5 years and a fine in the amount of $17,679.60 pesos or the equivalent of 20 days of community service work.

6.

On September 21, 1998, Thomas Lamar Bean was transferred to the La Tuna Penitentiary in Anthony, Texas/New Mexico, by virtue of the International Prisoner Transfer Treaty and the applicable federal statutes under 18 U.S.C. §4100, et seq.

7.

Petitioner was released from La Tuna Penitentiary on October 21, 1998, and placed on supervised release. Pursuant to 18 U.S.C. §4196A(b)(3) the jurisdiction over Petitioner as a supervised releasee was conferred upon the United States District Court for the Eastern District of Texas. Petitioner was released from his supervised release by that certain Order Terminating

Defendant's [Petitioner's] Supervised Release signed by the Honorable Joe J. Fisher on August 30, 1999 in Case No. 1:98CR147, styled: United States of America vs. Thomas Lamar Bean, in the United States District Court for the Eastern District of Texas, Beaumont Division.

REPUTATION OF PETITIONER

8.

Prior to this unintentional violation of a foreign law, Petitioner enjoyed all of the liberties of a United States citizen. Petitioner was self-employed as a car dealer at Buddy Chevrolet in Groves, Texas, which dealership was sold while Petitioner was in custody in Mexico. Since his release and return to the United States, Mr. Bean has opened a used car dealership under the trade name of Buddy Used Cars in Groves, Texas.

9.

Prior to this unfortunate and unintentional violation by Petitioner of a foreign law, Mr. Bean had no prior criminal history other than an arrest on February 17, 1977 in Orange County, Texas for driving while intoxicated, which complaint was dismissed by the County Attorney on July 12, 1978 due to insufficient evidence. Petitioner is well known throughout Southeast Texas as a law abiding citizen and asset of the community. Attached to this application are letters of recommendation sent to the judge in Nuevo Laredo, Mexico from the following elected officials:

a. Chief of Police of Vidor, Texas;
b. Sheriff of Orange County, Texas;
c. Chief of Police of Port Arthur, Texas;
d. City Marshall of Groves, Texas; and,

e. Judge Buddie J. Hahn of the 260th District Court of Orange County, Texas.

10.

Due in a large part to the publicity Mr. Bean's case received not only in Southeast Texas, but also in Laredo, Texas, the Federal Firearms and Explosives Law of the Republic of Mexico was amended to provide that a foreign resident who is a first time offender will receive an administrative sanction of a 200 day fine, without imprisonment. However, the Republic of Mexico did not make such amendment of their firearm laws expressly retroactive for Mr. Bean's case.

REQUEST FOR RELIEF

11.

Under 18 U.S.C. §925(c) a person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Secretary of the Treasury of the United States of America for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms. The Secretary of Treasury may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief will not be contrary to the public interest. Petitioner made such application to the Secretary of the Treasury by letter dated July 14, 1999, a true and correct copy of which is attached hereto as Exhibit "A."

12.

Under 18 U.S.C. §925(c) any person whose application for relief from disabilities is denied by the Secretary of the Treasury may file a petition with the United States District Court for the District in which he resides for a judicial review of such denial. Attached to this letter as Exhibit "B" is the original letter of denial from the Department of the Treasury, which states that the Secretary of the Treasury has delegated the authority for granting relief from disability sought by Petitioner to the Bureau of Alcohol, Tobacco and Firearms (ATF), and that since October of 1992 the ATF's annual appropriation has prohibited the spending of any funds to investigate or act upon such applications, which in effect denied Petitioner the relief requested under the existing statute.

13.

Petitioner requests this honorable District Court review the facts of this case and grant Petitioner relief from the disabilities imposed by Federal laws with respect to his acquisition, receipt, transfer, shipment, transportation, and possession of firearms, including any disability imposed by Federal laws with respect to Petitioner's eligibility to become a licensed firearms dealer. In support of this request, Petitioner would show unto the Court that Petitioner's record and reputation are such that it is not likely Petitioner will act in a manner dangerous to public safety and the granting of the relief requested would not be contrary to the public interest.

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays that this Honorable Court remove Petitioner's disabilities imposed by Federal

laws with respect to his ability to acquire, receive, transfer, ship, transport, and possess a firearm as an individual and as a licensed dealer.

Respectfully submitted,

/s/ LARRY C. HUNTER
LARRY C. HUNTER
Attorney at Law
1260 North Main
Vidor, Texas 77662
Phone: (409) 769-5453
Fax: (409) 769-0984
State Bar No. 10300700

COUNSEL FOR PETITIONER

THE STATE OF TEXAS

COUNTY OF ORANGE

BEFORE ME, the undersigned Notary Public, on this day personally appeared THOMAS LAMAR BEAN, who, after having been by me duly sworn, upon his oath stated that the facts contained in the preceding Petition for Relief From Disabilities Under Federal Firearms Act are true and correct.

SIGNED this 29th day of October , 1999.

/s/ THOMAS LAMAR BEAN
THOMAS LAMAR BEAN

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned Notary Public, by the said THOMAS LAMAR BEAN on this the 29th day of October, 1999.

/s/ Marie Goins
Notary Public, State of Texas

[SEAL OMITTED]
City of Vidor
Police Department
James L. "Butch" Reynolds
Chief of Police
1015 Orange St.
Vidor, Texas 77662
March 27, 1998

Honorable Juan Pablo Hernandez
Nuevo Laredo, Mexico

Ref: Bean, Thomas Lamar
D.O.B. 11/24/38
S.S. # 466-56-1640
Vidor, Texas 77630

Sir,

My name is James L. Reynolds and I am the Chief of the City of Vidor Police Department, Vidor, Texas. I am writing this letter concerning the arrest and incarceration of Thomas L. Bean, by the Mexican Authorities. I will not pretend to know the circumstance surrounding Tommy's arrest, but I have known him for quite a number of years and I cannot imagine he would intentionally put himself or anyone else in a position where he would be arrested.

Tommy is a very good person. One of high moral character and well respected by those who know him. He is an upstanding Lae [*sic*] Abiding citizen of this community.

If I can be of any further assistance in this matter, please do not hesitate in calling me.

Respectfully submitted,

/s/ JAMES L. REYNOLDS
JAMES L. REYNOLDS
Chief of Police
City of Vidor, Texas

This letter was signed and acknowledged before me by James L. Reynolds on this the 30th day of March, 1998.

/s/ Karen Cavel
Notary Public, State of Texas

[SEAL OMITTED] [SEAL OMITTED]

ORANGE COUNTY SHERIFF'S DEPARTMENT
P.O. Box 1468, Orange, TX 77631-1468
ORANGE (409) 883-2612, VIDOR (409) 769-6391

March 30, 1998

Honorable Juan Pablo Hernandez
Federal Judge
Nuevo Laredo, Mexico

Dear Judge Hernandez

I am the Sheriff of Orange County, Texas and I am writing this letter on behalf of Thomas Lamar Bean. Mr. Bean has been a resident of my jurisdiction for more than thirty (30) years. During the past, I have been personally acquainted with Mr. Bean and know him to be a person of excellent moral character and to have a fine reputation in our community. Further, I have had the privilege of working with Mr. Bean in the "Ducks Unlimited" program which aids the development of migratory birds, and Mr. Bean has been instrumental in his efforts to provide an appropriate habitat for birds which migrate from Canada through the United States of America on into your fine country.

Your Honor, please be advised that in my official capacity as Sheriff of Orange County, Texas. I have personally reviewed the criminal history of Mr. Bean, locally, as well as nationally in the same order as we regularly rely on in determining an individual's prior criminal history and have found Mr. Bean to have no criminal violations. Please consider this letter as my

request that you allow Mr. Thomas Lamar Bean to return to my jurisdiction. His presence has been greatly missed. Your thoughtful consideration in this highly important matter is greatly appreciated.

Respectfully,

/s/ MIKE WHITE
MIKE WHITE
Sherif

MW/cd

[SEAL OMITTED]

CITY of PORT ARTHUR

March 24, 1998

Honorable Judge Juan Pablo Hernandez
Nuevo Laredo, Mexico

RE: Tommy Bean

Dear Judge Hernandez:

On 03/24/98, I was saddened to learn that Mr. Tommy Bean has been incarcerated by authorities in Mexico, for being in possession of a small amount of ammunition. Mr. Bean works for a car dealership in Port Arthur and also collects guns as a hobby. Many of my officers, including myself, have traded and purchased duty weapons with Mr. Bean and he has always treated us most fairly. Mr. Bean is a good friend of mine and has been a civic leader in our community. Tommy is a well respected business person in Port Arthur, TX, and is a devoted family man of high integrity. He is not a "gun runner", smuggler, or criminal of any type.

I am deeply concerned for Mr. Bean, as he is an outstanding citizen of high moral character with an excellent reputation for fairness and honesty.

Any consideration that you can give Mr. Bean concerning his situation would be deeply appreciated. If you have any question concerning Mr. Bean's veracity and integrity, please feel free to contact me at your earliest convenience. (409) 983-8613; FAX (409) 983-8621

Sincerely,

/s/ M.E. GORRIS
M.E. GORRIS
Chief of Police

MEG:ts

This letter was signed and acknowledged before me by Tonya Summerlin on this the 30th day of March.

/s/ Tonya Summerlin
Notary Public, State of Texas

[SEAL OMITTED]

Graves Police Department
Stephen B. Savoy -- City Marshal

March 30, 1998

ATTN: Honorable Judge Juan Pablo Hernandez

It recently came to my attention that Tommy Bean had been taken into custody by the Mexican government due to ammunition found in his vehicle as he traveled into your country. I have had several years of professional contact with Tommy Bean as a Federal Firearms Licensee and have found him to be very trustworthy. I am assured in corresponding to you that his actions on the date of his arrest were not of any criminal intent.

Mr. Bean's reputation in the community has always been that of a law abiding citizen and I would hope that every consideration be given to rectifying the circumstances of his incarceration.

Sincerely yours,

/s/ STEPHEN B. SAVOY
STEPHEN B. SAVOY

This letter was signed and acknowledged before me by Stephen B. Savoy, on this the 30th day of March, 1998.

Lauren Edgar
Notary Public, State of Texas

[SEAL OMITTED]

BUDDIE J. HAHN
District Judge
260th Judicial District
Orange County Courthouse
Orange, Texas 77630

JUDY MINGLE, Court Coordinator	TELEPHONE
KELLIE DEROUEN, Court Reporter	409/882-7095
THOMAS NORWOOD, Bailiff	409/769-2400

To: Hon. Juan Pablo Hernandez

Re: Thomas Lamar Bean

Dear Judge Hernandez:

I am writing in support of my long time friend, Thomas Lamar Bean, who was arrested at the border on March 14, 1998, and charged with possession of contraband (firearm ammunition).

I have served in my present position as a state district judge for almost 14 years. Before that, I was a practising attorney in the city of Vidor, Texas, the hometown of Tommy Bean. I have known Tommy personally for over 25 years. I know his wife, Sadie, and his son and daughter grew up with my son.

Tommy Bean is a good lawabiding citizen. To my knowledge Tommy has never been arrested or even suspected of any illegal activity. He has been a manager of a successful Chevrolet dealership in Port

Arthur, Texas, for many years, and he is a good family man.

I know that you receive many letters regarding people who are to appear before you in court. I receive many of the same type of letters from friends and family of those charged with a criminal offense in my court. There is a natural tendency to discount the comments of many of these letters as they are written by friends trying to help friends. To a certain extent that is true of this letter. Tommy Bean is my friend. However, I cannot overstate what a good man Tommy really is, or the contribution he has made to his community.

I know for a fact that Tommy never intended to violate any law of the country of Mexico. Ignorance of the law is not a legal excuse, but in striving for justice, you and I know that intent is so important in judging the guilt or culpability of a particular individual or in deciding on a proper punishment.

I would hope that in deciding what disposition should be made of Mr. Bean's case, that you would accept as absolute truth that Mr. Bean is a good, decent, and honest man who never would have intentionally violated any law of Mexico, and that his violation of law was because he inadvertently allowed some cartridges to remain in his vehicle when he crossed the border. I know that you are aware that such possession in the United States is legal.

I believe that you will give this matter your full and careful attention, and I hope that you will do everything in your power to see that fairness and justice prevail.

Respectfully submitted,

/s/ BUDDIE J. HAHN
BUDDIE J. HAHN
Presiding Judge

This letter was signed and acknowledged before me by Buddie J. Hahn on this the 30th day March, 1998.

/s/ Judy Mingle
Notary Public State of Texas

[seal omitted]

LAW OFFICES OF
LARRY C. HUNTER
1260 North Main, Vidor, Texas 77662

Marie Goins
Secretary

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July 14, 1999

Secretary of the Treasury
c/o Director John Magaw
Bureau of Alcohol, Tobacco and Firearms
U.S. Department of the Treasury
650 Massachusetts Avenue, N.W.
Washington, DC 20226

Re: THOMAS LAMAR BEAN

APPLICATION FOR RELIEF FROM DISABILITIES
IMPOSED BY FEDERAL FIREARM LAWS

TO THE SECRETARY OF THE TREASURY:

Application is hereby made by THOMAS LAMAR BEAN, hereinafter referred to as "Applicant", for relief from the disabilities imposed by federal firearm laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms as provided by 18 U.S.C. §925(c), and in support thereof Applicant would show as follows:

1.

Applicant is a resident of Orange County, Texas, in the Eastern District of Texas. Applicant has been married to his only wife, Sara Bean, since May 25, 1962,

and has two adult children, Cory L. Bean and Julie L. Lightfoot. Applicant was a licensed firearms dealer, License No. 5-76-181-01-9C-35798, at the time of the occurrence of the events leading up to the need to file this application.

2.

Applicant was attending a gun show as a dealer in Laredo, Texas, accompanied by his assistants, Arthur Craig Pulliam, Kevin Anthony Lee, and his son, Justin Lee. On Saturday, March 14, 1998, at the conclusion of the gun show, Mr. Bean and his assistants decided to have dinner at a restaurant in Nuevo Laredo. Justin Lee was instructed to remove the various weapons and ammunition being stored in Mr. Bean's 1994 Suburban. Unfortunately, Justin Lee removed all of the weapons, but only some of the ammunition, leaving the following ammunition in plain view in the back of the Suburban, to-wit:

100 rounds of	Smith & Wesson	.40 caliber
100 rounds of	CCI	.22 caliber
6 live rounds of	Remington	.223 caliber
and 14 spent casings		

3.

Mr. Bean, Kevin Anthony Lee, and Arthur Craig Pulliam did not see the ammunition left in the Suburban, and on March 14, 1998, Mr. Bean's vehicle was stopped at the Mexican Port of Entry, Nuevo Laredo, Tamaulipas, Mexico, where the ammunition in plain view was discovered by the Mexican officials. All four individuals were arrested. Justin Lee was released later that evening because he was a juvenile. Kevin Anthony Lee and Arthur Craig Pulliam were later

released, but Thomas Lamar Bean was charged with introduction of ammunition into the Republic of Mexico since he was the owner of the vehicle and the ammunition.

4.

Mexican law requires an accused to furnish a statement regarding the crime with which the accused is charged, even if the statement is incriminating. The defendant can be charged with a separate offense should the defendant fail to furnish the statement. Mr. Bean acknowledged that he was carrying the ammunition, was not aware that the ammunition was in the vehicle, was not aware that possession of ammunition was an offense in the Republic of Mexico, that the ammunition was not hidden but in plain view, and that the ammunition was in his Suburban as a part of the inventory he was selling at the gun show in Laredo, Texas.

5.

Applicant, Thomas Lamar Bean, was sentenced on May 24, 1998, to a term of imprisonment of 5 years and a fine in the amount of $17,679.60 pesos or the equivalent of 20 days of community service work.

6.

On September 21, 1998, Thomas Lamar Bean was transferred to the La Tuna Penitentiary in Anthony, Texas/New Mexico, by virtue of the International Prisoner Transfer Treaty and the applicable federal statutes under 18 U.S.C. §4100, et seq.

7.

The following identifying data is being furnished concerning Applicant:

True Name:	Thomas Lamar Bean
Date of Birth:	11-24-38
Place of Birth:	Newton County, Texas
Age:	60
Race:	White (non-Hispanic)
Sex:	Male
SSN:	466-56-1640
FBI No.:	Unassigned
USM No.:	28368-077
TX DL No.:	03985767
Education:	12 years
Dependents:	One
Citizenship:	United States
Legal Address:	6000 Highway12 Vidor, Texas 77662
Aliases:	None

8.

Applicant was released from La Tuna Penitentiary on October 21, 1998, and placed on supervised release. Pursuant to 18 U.S.C. §4106A(b)(3) the jurisdiction over Applicant as a supervised releasee is conferred upon the United States District Court for the Eastern District of Texas.

9.

Prior to this unintentional violation of a foreign law, Applicant enjoyed all of the liberties of a United States citizen. Applicant was self-employed as a car dealer at Buddy Chevrolet in Groves, Texas, which dealership was sold while Applicant was in custody in Mexico. Since his release and return to the United States, Mr.

Bean has opened a used car dealership under the trade name of Buddy Used Cars in Groves, Texas.

10.

Prior to this unfortunate and unintentional violation by Applicant of a foreign law, Mr. Bean had no prior criminal history other than an arrest on February 17, 1977 in Orange County, Texas for driving while intoxicated, which complaint was dismissed by the County Attorney on July 12, 1978 due to insufficient evidence. Applicant is well known throughout Southeast Texas as a law abiding citizen and asset of the community. Attached to this application are letters of recommendation sent to the judge in Nuevo Laredo, Mexico from the following elected officials:

a. Chief of Police of Vidor, Texas;
b. Sheriff of Orange County, Texas;
c. Chief of Police of Port Arthur, Texas;
d. City Marshall of Groves, Texas; and,
e. Judge Buddie J. Hahn of the 260th District Court of Orange County, Texas.

Also attached to this application is a copy of an editorial from the Beaumont Enterprise which ran shortly after Mr. Bean was transferred from the Republic of Mexico to the La Tuna Penitentiary in Anthony, Texas/New Mexico, which is a good example of how the Southeast Texas community reacted to Mr. Bean's arrest, incarceration, and sentence.

11.

Due in a large part to the publicity Mr. Bean's case received not only in Southeast Texas, but also in Laredo, Texas, the Federal Firearms and Explosives Law of the Republic of Mexico was amended to provide that a foreign resident who is a first time offender will

receive an administrative sanction of a 200 day fine, without imprisonment. However, the Republic of Mexico did not make such amendment of their firearm laws expressly retroactive for Mr. Bean's case.

12.

Applicant would show unto the Secretary that the circumstances regarding his disability under the United States Federal Firearm Laws, and the Applicant's record and reputation, are such that the Applicant will not be likely to act in a manner dangerous to public safety, and the granting of the relief from such disabilities would not be contrary to the public interest.

WHEREFORE, PREMISES CONSIDERED, Applicant prays that the Secretary grant Applicant relief from the disabilities incurred as provided by 18 U.S.C. §925(c) to allow Applicant to again possess firearms and ammunition, including firearms and ammunition which have been shipped or transported in interstate or foreign commerce, and to allow Applicant to regain his firearms license as a dealer in firearms other than destructive devices.

Respectfully submitted,

/s/ THOMAS L. BEAN
THOMAS LAMAR BEAN

/s/ LARRY C. HUNTER
LARRY C. HUNTER
Attorney for Applicant
Texas State Bar No. 10300700

[SEAL OMITTED]

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
WASHINGTON, DC 20226

July 27, 1999

Mr. Larry C. Hunter
Attorney at Law
1260 North Main
Vidor, Texas 77662

Dear Mr. Hunter:

This is in reference to the recent application for restoration of Federal firearms privileges you submitted on behalf of your client, Mr. Thomas Lamar Bean, to the Bureau of Alcohol, Tobacco and Firearms (ATF).

As you are aware, under the provisions of the Gun Control Act of 1968 (GCA), convicted felons and certain other persons are prohibited from possessing firearms. (See 18 U.S.C. § 922(g).) The GCA, however, provides the Secretary of the Treasury with the authority to grant relief from this disability where the Secretary determines that the person is not likely to act in a manner dangerous to the public safety. (See 18 U.S.C. § 925 (c).) The Secretary has delegated this authority to ATF.

Since October 1992, ATF's annual appropriation has prohibited the expending of any funds to investigate or act upon applications for relief from Federal firearms

disabilities. This restriction is located in Pub. L. No. 105-277, 112 Stat. 2681, containing ATF appropriations for fiscal year 1999. As long as this provision is included in current ATF appropriations, the Bureau cannot act upon applications for restoration of Federal firearms privileges submitted by individuals. In view of the above restriction, we are returning Mr. Bean's application for restoration of Federal firearms privileges and the supporting documentation.

Furthermore, the restriction contained in Pub. L. No. 105-277 does not change Mr. Bean's status as a prohibited person. He is still prohibited from possessing, receiving, transporting, or shipping firearms under Federal law.

As a result of the foregoing, we recommend that you contact our office about obtaining restoration of Federal firearms privileges for your client if and when Congress acts to remove the restriction currently imposed. The address is as follows: Bureau of Alcohol, Tobacco and Firearms, P.O. Box 50220, Tech World Post Office, Washington, DC 20091, ATTN: Restoration Section.

We trust this has been responsive to your inquiry. If any further assistance is needed, please contact our Program Analyst, Barbara Terrell, at 202-927-8040.

Sincerely yours,

/s/ PAMELA A. POTACZEK
PAMELA A. POTACZEK
Chief, Firearms Trafficking Branch

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

Civil Action No. 1:99-CV-724

THOMAS LAMAR BEAN, PETITIONER

v.

UNITED STATES OF AMERICA, BUREAU OF ALCOHOL TOBACCO AND FIREARMS, RESPONDENTS

PETITIONER'S TRIAL BRIEF

[Filed Dec. 27, 1999]

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now THOMAS LAMAR BEAN, Petitioner in the above entitled and numbered cause of action, and files this supporting trial brief as encouraged by the Court, and Petitioner would respectfully show unto the Court as follows:

STATEMENT OF FACTS

1.

Petitioner was convicted in the Republic of Mexico for the introduction of ammunition into the Republic of Mexico, and was sentenced to a term of imprisonment of five years and a fine. Said conviction resulted from Petitioner's mistake of fact in crossing border into the Republic of Mexico with ammunition in plain view in the back of the Suburban he was operating, after Petitioner had instructed a third party to remove all wea-

pons and ammunition from his vehicle. Said conviction followed Petitioner's signing of a confession in Spanish when Mr. Bean does not speak, read or understand Spanish. Mexican law requires an accused to furnish a statement regarding the crime charged, even if the statement is incriminating, and the arrested person can be charged with a separate offense should he or she fail to make such statement.

2.

On September 21, 1998, Petitioner was transferred to the La Tuna Penitentiary in Anthony, Texas/New Mexico, by virtue of the International Prisoner Transfer Treaty and the applicable federal statutes under 18 U.S.C. §4100, et seq. Petitioner was released from La Tuna Penitentiary on October 21, 1998, and placed on supervised released. Pursuant to 18 U.S.C. §4106A(b)(3), the jurisdiction over Petitioner as a supervised releasee was conferred upon the United States District Court for the Eastern District of Texas. Petitioner was released from supervised release by an order signed by Hon. Joe J. Fisher on August 30, 1999, in Case No. 1:98CR147, styled: *United States of America* vs. *Thomas Lamar Bean*, in the United States District Court for the Eastern District of Texas, Beaumont Division.

* * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civil Action No. 1:99-CV-724

THOMAS LAMAR BEAN, PETITIONER

v.

UNITED STATES OF AMERICA, BUREAU OF ALCOHOL TOBACCO AND FIREARMS, RESPONDENTS

[Filed Feb. 9, 2000]

GOVERNMENT'S OBJECTIONS TO PETITIONER'S PROPOSED FINDINGS OF FACT AND CONCLUSION OF LAW

COMES NOW the United States of America by and through its Assistant United States Attorney Paul E. Naman and makes these objections to Petitioner's Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

Petitioners Findings of Fact are supported by the evidence presented at the hearing of January 20, 2000.

* * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civil Action No. 1:99-cv-724

THOMAS LAMAR BEAN, PETITIONER

v.

UNITED STATES OF AMERICA, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, RESPONDENTS

[Filed Mar. 21, 2000]

VOLUME 1 OF 1, PAGES 1 THROUGH 48
TRANSCRIPT OF HEARING: PETITIONER FOR RELIEF FROM DISABILITY FIREARMS ACT
BEFORE THE HONORABLE JOE J. FISHER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PETITIONER, Thomas Lamar Bean:	Larry C. Hunter Attorney at Law 1260 North Main Vidor, Texas 77662 (409) 769-5453
FOR THE RESPONDENTS, United States of America, Bureau of Alcohol, Tobacco and Firearms:	Paul Naman John Burch Stevens, Jr. Assistant U.S. Attorneys U.S. Attorney's Office 350 Magnolia, Suite 150 Beaumont, Texas 77701-2237 (409) 839-2538

COURT REPORTER:	C. FRANK MCMILLAN P. O. Box 2664 Beaumont, Texas 77704 (409) 654-2805

Proceedings recorded by stenograph shorthand; transcript produced by CAT system.

* * * * *

[6] **THOMAS LAMAR BEAN, PETITIONER, SWORN**

THE COURT: Have a seat in the witness chair and speak into the microphone.

MR. HUNTER: May I proceed, Your Honor?

THE COURT: Yes, sir.

* * * * *

[7] Q All right. What is your occupation:

A I'm a used car dealer.

* * * * *

[8] Q Were you in Laredo, Texas, on Saturday, March 14th, 1998?

A Yes.

Q And what were you doing at that time?

A I was doing a gun show in Laredo.

Q And who was assisting you with that gun show?

A Art Pulliam, Kevin Lee, and his son, Justin Lee.

Q Did you have a good day of sales at the show on Saturday?

A Tremendous.

Q And did you decide to take the gentlemen that were helping you and one of the gentleman's sons with you into Mexico to enjoy a meal at a restaurant?

A That is correct.

Q Prior to crossing the border, had you given Justin Lee any instructions about what to do concerning the guns and [9] ammunition in your Suburban?

A Yes.

Q What did you tell him to do?

A Mr. Pulliam and Mr. Lee have Texas—carry handgun permits. And I instructed them that we would go back to the motel and that we would not take anything across the border that might—any guns or anything across the border. And I asked Justin to check out the Suburban and anything in there to remove it.

Q Did he remove the firearms that were in the Suburban?

A Yes, the firearms were—the firearms were on the person themselves. And we went back to the motel and did all of that.

Q All right. Did Mr. Justin Lee, the boy, remove anything from the Suburban prior to going into Mexico?

A I don't know if he removed anything or not.

Q After you had asked Justin Lee to check the vehicle, did you personally check the vehicle?

A No, I did not.

Q When you went across the border were you stopped at the border by customs agents?

A Red light.

Q They have a green light/red light system?

A Right.

[10] Q And your vehicle received a red light?

A Red light.

Q Does that mean you need to stop so they can inspect the vehicle?

A Correct.

Q Was there ammunition that had been left in your vehicle ?

A Yes, there was.

Q Was it in plain view—

A Yes.

Q – in the rear of the vehicle?

A Yes.

Q Where was it located?

A It was in a plastic tray. In the right-hand side of the Suburban there is some plastic trays that are—where the Suburban interior comes up, there's some trays that go right along the last long window in the rear. There's a plastic tray there.

Q Above the wheel well?

A Yes.

Q Did you explain to the custom agents that you did not know the ammunition had been left in the vehicle?

A Yes.

Q And were all four of you arrested at the border?

A Yes.

Q Did the Mexican officials eventually release Justin Lee?

A Yes

[11] Q Where were you, Mr. Pulliam and Mr. Lee being held after you were first arrested?

A The night we was arrested we were held at, I presume, the police station. And the next morning we went to, which was Sunday, they took us to like downtown. And it was like a square and they put us in a cell like in the cellar.

Q Okay. Were you able to obtain the release of Mr. Pulliam and Mr. Lee?

A Mr. Pulliam and Mr. Lee was released.

Q How was that release arranged?

A There was bonds posted—or I was told it was bonds posted—of $2500 each and there was a bond posted for me for $10,000.

Q And who arranged for that payment for the bonds?

A Mr. Gus Cargile.

Q Once the bonds were posted or the money paid for Mr. Pulliam and Mr. Lee, were they actually released from custody?

A Yes.

Q And were you released from custody?

A No.

Q Did you learn later that they wanted more than $10,000?

A Well, when Mr. Cargile brought the 10,000, they decided that they wanted 20,000.

Q How long were you held in Mexico before they eventually [12] charged you with the criminal offense of crossing the border with ammunition?

A I don't know. I can't answer that.

Q Did you retain the services of a Mexican attorney–

A Yes.

Q – to represent you there?

A Yes.

Q Did your wife also retain the services of a CPA from Mexico who had experience in obtaining the release of persons in your position?

A Yes.

Q And as a result of the hiring the Mexican CPA was your first attorney dismissed?

A Right. Yes?

Q And did the CPA then hire another attorney?

A No.

Q Were you represented at the time of your trial in the Mexican Court by an attorney?

A No.

Q Sir?

A No.

Q Was there a public defender that was representing you in some fashion?

A When we hired the gentleman to negotiate the terms for release one of the stipulations was that I had to fire my [13] attorney and I had to go through the public defender.

Q Do you know if the public defender was present at your trial?

A I have no idea.

Q Were you asked, during the course of your stay prior to trial, to sign certain documents which were printed in Spanish?

A Yes.

Q Did you know what you were signing?

A No.

Q Can you read the Spanish languge?

A No.

Q Did anyone attempt to explain to you in English what the documents were?

A Yes.

Q And who was that person?

A Well, on each document they always had someone else. And it was like another Mexican that could speak some English and like, you know, couldn't hold—couldn't carry on a conversation in English, but he could speak some English.

Q Who would bring the documents to you to sign? Was it the public defender or other people?

A The documents were—I would be called up from my cell in prison and into like the lobby. And it

was the prison [14] officials that had the documents for me to sign.

Q So you didn't have the opportunity to speak with your attorney before signing documents?

A Never.

Q Were you able to understand from the translation, the partial translation you were given, exactly what the documents were or why your signature was required?

A Not really.

Q Did you realize that one of the documents was a confession?

A No.

Q When were you first aware that you had signed a confession?

A I don't know exactly the length of time. But my wife and two or three more people, I don't know exactly who they were, flew to Monterey to meet with this official to try to help me get released. And he told them that I had signed a confession. And when—when—the next time I talked to her, after she got back, she told me.

Q Okay. Did that knowledge come to you after you had been convicted and sentenced?

A I'm not sure. I think it did.

Q But you're not positive?

A I'm not positive. I can't give you a date.

Q Would it be fair to characterize that period in your [15] life as a living nightmare?

A That would be putting it very mildly.

Q Did you expect to be released based on the information furnished to you by the CPA?

A Yes.

Q Did law enforcement officers or friends who knew you send letters of recommendation to the Judge in Mexico through your representative in Mexico?

A Yes.

Q And I believe we have marked those as Exhibit 6; is that correct, Mr. Bean?

MR. HUNTER: May I approach the witness, Your Honor, and show him the number?

THE COURT: Yes.

A Yes.

Q (By Mr. Hunter) Would you look through those documents to see if those are the documents that were sent on your behalf?

A Yes.

MR. HUNTER: Your Honor, we would tender Exhibit 6 for the purpose of just showing those were letters of recommendation if there's no object?

MR. NAMAN: No objection, Your Honor.

THE COURT: They will be accepted in evidence.

Q (By Mr. Hunter) Did you personally know those [16] individuals who wrote the letters of recommendation?

A Do I know them?

Q Yes, sir.

A Yes.

Q And could you just tell the Court briefly who wrote the letters that we have marked as Exhibit No. 6?

A Okay. We have the Chief of Police in Vidor where I live. We have the Sheriff in Orange County where I reside. We have the Chief of Police in Port Arthur, Texas, where my business was. We have the Chief of Police in Groves, Texas, which Groves and Port Arthur where my business was is right across the street. We have Judge Buddie Hahn is a judge in Orange County. We have the Orange County District Attorney. We have a prominent doctor in Port Arthur, which is—I had seen on occasions. We had the YMBL in Beaumont, Texas. We had Joe E. Polk from Beaumont who was my partner in Buddy Chevrolet; and we had the church.

Q Were you afforded a trial in Mexico?

A I couldn't hear you.

Q Were you afforded a trial in Mexico?

A Did I go to trial?

Q That will serve the same purpose. Yes, sir.

A No.

Q Were the court proceedings in Mexico anything similar to the court proceedings here in the United States?

[17] A No.

Q Were you able to testify and explain what happened in open Court as we're doing here today?

A No.

Q Were you shocked to learn that you had been found guilty and sentenced to five years in prison?

A Devastated.

Q How did you obtain your release back to the United States?

A I came back by way of a treaty that the United States and Mexico has. And it's commonly called a Prisoner Exchange Program.

Q Okay. And where were you transferred to from Mexico?

A From Nuevo Laredo I was transferred to Monterey. And I was in Monterey for less than a week. From Monterey I was transferred to El Paso and—which is La Tuna, a federal. And it's on—the address is New Mexico, Texas. It's right

on the border there. And that's where I was transferred to.

Q Were you eventually granted a supervised release—

A Yes.

Q – from that federal facility?

A Yes.

* * * * *

[20] Q Other than traffic citations, have you ever been convicted of a crime in the United States?

A No.

Q Have you ever been charged with or convicted of a felony in the State of Texas or any other state?

A No.

Q Do you know of any reason why anyone would fear you might act in a dangerous manner or a manner dangerous to the public if you were granted the right to possess a firearm?

A No.

Q And do you know of any reason why anyone would believe that granting you the right to possess a firearm would be contrary to public interest?

A No.

Q Can you just explain to the Judge why you would like the right to possess a firearm at your age?

THE WITNESS: Judge, I'm 61 years old. All I've done in my life is work and I like to hunt. And I like to deer hunt and I like to dove hunt. And I don't have that much time left and I don't feel like that I deserve to be [21] under the predicament I'm under.

MR. HUNTER: I pass the witness, Your Honor.

MR. NAMAN: I just have a couple of questions, Your Honor.

CROSS-EXAMINATION

BY MR. NAMAN:

Q Mr. Bean, as I understand it, you hired an attorney right after you were arrested; is that correct?

A Yes, sir.

Q And this attorney was to represent you in court and advise you and things like that; is that correct?

A Yes.

Q And then you hired the CPA. Does that mean Certified Public Accountant?

A Yes.

Q And as the result of that you dismissed your attorney?

A Yes.

Q Would it be fair to say that you hired this CPA in an attempt to circumvent the justice system of the state—of the Nation of Mexico and to obtain your release surreptitiously; would that be a fair statement?

A I was under the impression that that's the way you did it in Mexico.

Q So you didn't have very much respect for the justice system of the country of the Mexico; is that correct? Is [22] that correct?

A I never thought about it.

Q And your predicament is partially because you tried to circumvent the justice system of Mexico and fired your attorney where instead of going through the normal course of things; isn't that correct?

A Yes.

* * * * *

[28] DIRECT EXAMINATION.

BY MR. HUNTER:

Q Would you state your name for the Judge, please?

A My name is M. E. Gorris. My nickname is Duke.

Q Okay. And, Mr. Gorris, what is your occupation?

A The Chief of Police of Port Arthur, Texas.

Q And how long have you been in law enforcement?

A Twenty-eight years, sir.

Q And when were you hired as Chief of Police for the City of Port Arthur?

A July the 9th—I'm sorry. July the 7th, 1990.

Q And how long have you known Tommy Bean?

[29] A Approximately nine and a half years.

Q How did you meet Mr. Bean?

A I met Mr. Bean at a gun show in Beaumont, Texas.

Q And are you the holder of a Federal Firearms License as well?

A I have been. I'm not currently, no.

Q Did you become friends with Mr. Bean?

A Oh, yes. We became friends over the years.

Q Did you actually attend some gun shows with Mr. Bean as a dealer yourself?

A Yes, I did. We tabled together at several gun shows throughout the area.

Q Did you ever notice anything about the manner in which Mr. Bean handled his firearm business that caused you any concern as an individual or as a law enforcement officer?

A Oh, no, he was very methodical; and if he had any suspicion or any doubt or anything that would indicate that something might not be quite right,

he just simple wouldn't sell. He would not trade, he just wouldn't do it.

Q Are you familiar with Mr. Bean's reputation in this community?

A Yes, sir, I am.

Q What do you understand his reputation to be?

A He is an upstanding businesssman, good family man. I've never had one report against him. I've done a lot of [30] investigations of all types in my city because of the nature of my work, undercover operations, et cetera. And if there were any complaints against him or his name was brought up in any type of criminal activity, I would know it.

Q Did you learn of Mr. Bean's arrest and eventual conviction in Mexico for crossing the border in possession of ammunition?

A Yes, sir, I did.

Q Were you concerned about his safety as a result of that arrest?

A I was very concerned about his safety.

Q As a law enforcement officer and resident of this community, would you have any objection to Mr. Bean being granted the right to possess a firearm, following that Mexico conviction?

A Absolutely not.

Q Can you represent to the Court, based on your knowledge of Mr. Bean, that Mr. Bean will not

likely act in a manner dangerous to public safety if he's granted the right to possess a firearm?

A Yes, sir, I can say that.

Q And do you believe that granting Mr. Bean the right to possess a firearm would in any way be contrary to the public interest?

A No, sir, it would not.

[31] MR. HUNTER: I'll pass the witness, Your Honor.

MR. NAMAN: I have no questions,Your Honor.

THE COURT: All right, you may step down.

THE WITNESS: Thank you, Your Honor.

THE COURT: Thank you for coming. You may be excused any time you wish.

Call your next witness.

MR HUNTER: Your Honor, we had subpoenaed Mr. Carl Fronabarger with the ATF. And I don't know if they've granted him permission to testify or not.

Are you Mr. Fronabarger?

I would like to call Mr. Fronabarger next, Your Honor.

THE COURT: Okay.

CARL FRONABARGER, PETITIONER'S WITNESS, SWORN

THE COURT: Have a seat in the witness chair. You may proceed.

DIRECT EXAMINATION

BY MR. HUNTER:

Q Would you state your name for the Court, please?

A Carl Allen Fronabarger.

Q And I apologize if I mispronounce your name.

What is your occupation?

A I'm an Inspector for the Bureau of Alcohol, Tobacco & Firearms.

[32] Q And how long have you been an ATF agent?

A Well, I'm an Inspector which it's not the same as an agent. But I've been employed with ATF for eleven and a half years.

Q As an Inspector did your responsibilities include checking firearm dealers' records?

A Yes.

Q And is that how you came to know Mr. Tommy Bean?

A Yes, it is.

Q How did you meet Mr. Bean?

A I first remember meeting Tommy when he came to the office to get an application from an FFL.

Q Do you know how long Mr. Bean held a Federal Firearms License?

A Well, I think he got it approximately in either late '93 or '94, and held it up until about '98. So that would be approximately five years.

Q Is it fair to say his license was not renewed because of this Mexican conviction?

A Yes.

Q Was Mr. Bean a cooperative firearm's dealer in terms of your checking his records?

A Yes, he was.

Q Was he a good record keeper?

A I would say his records were excellent.

[33] Q How did you become aware of Mr. Bean's conviction in Mexico for crossing the border in possession of ammunition?

A I can't honestly say for sure. But I think I just heard it on the news.

Q I'm sorry?

A I think I heard it on the news originally.

Q If Mr. Bean informed you, as he has here today, that he was not aware of the ammunition being in his vehicle at the time, would you have any reason to doubt what he says?

A None whatsoever.

Q Do you know of any reason—as the ATF Inspector responsible for checking Mr. Bean's records, do you know of any reason to believe that he would act in a manner dangerous to public safety if he were granted the right to possess a firearm?

A No, I do not.

Q And do you know of any reason to believe that granting him the right to possess a firearm would be contrary to public interest at this point in time?

A As I understand the question, no, I do not.

MR. HUNTER: I pass the witness, Your Honor.

THE COURT: Mr. Naman

CROSS-EXAMINATION

BY MR. NAMAN:

Q Just so the Court will understand, as an inspector your [34] job is just to check on records; is that correct?

A That's absolutely correct.

Q You do no investigation into character or anything like that?

A That's correct.

Q So when Counsel asked you if you knew any reason, you haven't done any investigation into Mr. Bean's character to know whether it's good, bad or anything else, do you?

A Nothing beyond doing a records check at the FBI's NCIC computer, which is standard procedure.

Q You haven't talked to people in the community or anything like that? That's not your job?

A No, I do not.

Q And if Congress allowed funds to do the investigation for this application, would you have done that investigation?

A No, that is done by the agents in the office.

Q Okay. So it's not even your job to do the kind of investigation necessary for this application, is it?

A That's correct.

Q So you have no idea what Mr. Bean's character is or is not?

A I do not know him other than my professional dealings with him, that's correct.

THE COURT: Anything further?

[35] MR. HUNTER: No further questions, Your Honor.

THE COURT: All right. You may come down.

* * * * *

(5)

Supreme Court, U.S.
FILED

APR 15 2002

OFFICE OF THE CLERK

No. 01-704

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

THOMAS LAMAR BEAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

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53 pp

QUESTION PRESENTED

Under federal law, a person who is convicted of a felony is prohibited from possessing firearms. The Secretary of the Treasury, acting through the Bureau of Alcohol, Tobacco, and Firearms (ATF), may grant relief from that prohibition if it is established to his satisfaction that certain preconditions are established. See 18 U.S.C. 925(c). Since 1992, however, every appropriations law for ATF has specified that ATF may not expend any appropriated funds to act upon applications for such relief. The question presented is:

Whether, despite the appropriations provision barring ATF from acting on applications from relief from firearms disabilities, a federal district court has authority to grant such relief to a person convicted of a felony.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 253 F.3d 234. The opinion of the district court (Pet. App. 12a-38a) is reported at 89 F. Supp. 2d 828.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2001. A petition for rehearing was denied on August 21, 2001 (Pet. App. 39a-40a). The petition for a writ of certiorari was filed on November 19, 2001, and was granted on January 22, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions—18 U.S.C. 922(g)(1) and Section 925(c), and the applicable appropriations statutes—appear at Pet. App. 41a-43a.

STATEMENT

1. Under federal law, it is unlawful for any person convicted of a felony to ship or transport any firearm or ammunition in interstate or foreign commerce, to possess any firearm or ammunition in or affecting commerce, or to receive any firearm or ammunition that has been shipped or transported in commerce. 18 U.S.C. 922(g)(1). A convicted felon may apply to the Secretary of the Treasury for relief from the disabilities imposed by that prohibition. 18 U.S.C. 925(c). The Secretary "may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." *Ibid.* The Secretary has delegated his authority to act on applications for relief to the Director of the Bureau of Alcohol, Tobacco, and Firearms (ATF). 27 C.F.R. 178.144(b) and (d). Whenever the Secretary grants relief to any person pursuant to that provision, "he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor." 18 U.S.C. 925(c).

A person whose application for relief is "denied" by the Secretary may file a petition with the federal district court for the district in which he resides "for a judicial review of such denial." 18 U.S.C. 925(c). The court may "admit additional evidence where failure to do so would result in a miscarriage of justice." *Ibid.*

The scope of judicial review in such an action is governed by the Administrative Procedure Act (APA), 5 U.S.C. 706. See S. Rep. No. 583, 98th Cong., 2d Sess. 26-27 (1984).[1]

In 1992, the annual appropriations law for ATF provided that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1732. In each subsequent year, Congress has permitted the use of appropriated funds to process applications for relief filed by corporations, but it has retained the bar on the use of appropriated funds to process applications for relief filed by individuals.[2]

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[1] Congress first provided an avenue for relief from firearms disabilities in 1965. Federal Firearms Act, Pub. L. No. 89-184, 79 Stat. 788. That provision was enacted after the Olin Mathieson Chemical Corporation, the parent corporation of the firearms manufacturer Winchester, was convicted of a felony. H.R. Rep. No. 708, 89th Cong., 1st Sess. 2-3 (1965). The relief provision allowed Winchester to remain in business. In 1986, Congress added the provision allowing for judicial review. Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449. A decade before Congress added the judicial review provision, the Ninth Circuit had held that an applicant for relief could obtain judicial review under the APA of a denial of an application. *Kitchens* v. *Department of Treasury*, 535 F.2d 1197, 1199-1200 (1976).

[2] Treasury and General Government Appropriations Act, 2002, Pub. L. No. 107-67, 115 Stat. 519; Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763A-129; Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 113 Stat. 434; Treasury and General Government Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-485; Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 111 Stat. 1277; Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-319;

The Senate Report accompanying the first appropriations law explained the purposes of the bar:

> After ATF agents spend many hours investigating a particular applicant they must determine whether or not that applicant is still a danger to public safety. This is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made. The Committee believes that the approximately 40 man-years spent annually to investigate and act upon these investigations and applications would be better utilized to crack down on violent crime.

S. Rep. No. 353, 102d Cong., 2d Sess. 19-20 (1992).

The House Report accompanying the fourth appropriations law reiterated those reasons for the ban:

> For the fourth consecutive year, the Committee has added bill language prohibiting the use of Federal funds to process applications for relief from Federal firearms disabilities. * * * [T]hose who commit felonies should not be allowed to have their right to own a firearm restored. We have learned sadly that too many of these felons whose gun ownership rights were restored went on to commit violent crimes with firearms. There is no reason to spend the Government's time or taxpayer's money to restore a convicted felon's right to own a firearm.

H.R. Rep. No. 183, 104th Cong., 1st Sess. 15 (1995).

Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 471; Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2385; Treasury, Postal Service, and General Government Appropriations Act, 1994, Pub. L. No. 103-123, 107 Stat. 1228.

2. In March 1998, respondent and three associates attended a gun show in Laredo, Texas. Pet. App. 12a. After the show, respondent and his associates drove respondent's car to Nuevo Laredo, Mexico. *Id.* at 12a-13a. Mexican officials stopped the car at the port of entry and discovered approximately two hundred rounds of ammunition in the back of the car. *Id.* at 13a. Respondent admitted ownership of the car and the ammunition, but asserted that the ammunition had been inadvertently left in the car. *Ibid.* Respondent was convicted of importing ammunition into Mexico and sentenced to five years' imprisonment. *Ibid.*

After spending four months in a Mexican jail, respondent was transferred to the La Tuna Penitentiary in the United States, where he spent another month before being released. Pet. App. 13a. Respondent was then placed on supervised release under the jurisdiction of the United States District Court for the Eastern District of Texas. The district court terminated supervision of respondent approximately ten months later, on August 30, 1999. *Id.* at 14a.

By virtue of his felony conviction in Mexico, respondent was prohibited by 18 U.S.C. 922(g)(1) from possessing, distributing, or receiving firearms or ammunition. 27 C.F.R. 178.11 ("crime punishable" definition).[3]

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[3] There is a conflict in the circuits on whether a foreign conviction triggers firearms disabilities. Compare *United States* v. *Atkins*, 872 F.2d 94 (4th Cir.) (foreign conviction triggers firearms disabilities), cert. denied, 493 U.S. 836 (1989), and *United States* v. *Winson*, 793 F.2d 754 (6th Cir. 1986) (same), with *United States* v. *Concha*, 233 F.3d 1249 (10th Cir. 2000) (foreign conviction does not trigger firearms disabilities). In this case, however, respondent conceded (C.A. Br. 18) that his conviction in Mexico triggered firearms disabilities under 18 U.S.C. 922(g)(1), and the court of appeals

Respondent applied to ATF for relief from his firearms disabilities. Pet. App. 15a. ATF informed respondent that it could not act on his application because ATF's annual appropriations law forbids it from expending any funds to investigate or act upon applications for relief from federal firearms disabilities. J.A. 33-34.

Respondent then filed suit in the United States District Court for the Eastern District of Texas. Pet. App. 12a. Relying on the judicial review provision in Section 925(c), respondent asked the district court to conduct its own inquiry into his fitness to possess a gun, and to issue a judicial order granting relief from his firearms disabilities. J.A. 8-15. Respondent attached various affidavits from persons attesting to his fitness to possess firearms. J.A. 16-26.

In reliance on the Fifth Circuit's decision in *United States* v. *McGill*, 74 F.3d 64, cert. denied, 519 U.S. 821 (1996), the government moved to dismiss respondent's complaint. Mot. To Dismiss at 2-3. In *McGill*, the Fifth Circuit held that the appropriations bar prevents ATF from acting on applications for relief from firearms disabilities and that a district court has no authority to consider an application for relief in the first instance. 74 F.3d at 67.

The district court denied the government's motion to dismiss. Pet. App. 12a-38a. The district court concluded that *McGill* had been incorrectly decided and declined to follow it. *Id.* at 18a-29a. Specifically, the court concluded that, while the appropriations law prevents ATF from acting on applications for relief from firearms disabilities, a court retains authority to grant such relief. *Id.* at 24a. The court also concluded that

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did not address that issue. Pet. App. 11a. That question is therefore not presented here. See Gov't Reply Pet. 1-5.

ATF's failure to act on respondent's application constituted an effective denial of his application that was subject to judicial review. *Id.* at 29a-30a. After a hearing, the court determined that respondent was not likely to act in a manner dangerous to public safety and that granting relief from firearms disabilities to him would not be contrary to the public interest. *Id.* at 34a-36a. The court then entered a judgment granting respondent relief from his firearms disabilities. *Id.* at 37a-38a.

3. The court of appeals affirmed. Pet. App. 1a-11a. The court acknowledged that it had held in *McGill* that the annual appropriations laws "reflected an intent to suspend the relief provided to individuals by § 925(c)." *Id.* at 4a. The court nonetheless refused to follow that decision.

The court noted that the *McGill* court had relied on the principle that Congress may amend substantive law through an appropriations statute. Pet. App. 6a-7a. In the court of appeals' view, the decisions of this Court supporting that principle are limited to the repeal of "financial right[s]." *Id.* at 7a-8a. As a ground for departing from its earlier decision in *McGill*, the court also noted that "we have a critical additional factor, the intervening passage of time and the resulting reality of the effective non-temporary 'suspension' of statutorily created rights." *Id.* at 9a. The court also deemed it significant that Congress had refused to enact a bill that would have eliminated the relief provision. *Id.* at 5a-6a. Based on those considerations, the court held that it "must now conclude that merely refusing to allow the agency responsible for facilitating those rights to use appropriated funds to do its job under the statute is not the requisite direct and definite suspension or repeal of the subject rights." *Id.* at 9a.

The court further held that when ATF notified respondent that it would not act on his application, respondent's "administrative remedies *de facto* were exhausted," and "the trial court had jurisdiction to entertain this appeal." *Ibid.* Finally, the court held that the district court "did not err as a matter of law" in granting respondent relief from his firearms disabilities. *Id.* at 11a.

SUMMARY OF ARGUMENT

As six courts of appeals have held, a district court does not have authority to grant a convicted felon relief from his firearms disabilities. The court of appeals in this case erred in holding otherwise.

Section 925(c) authorizes the Secretary of the Treasury, through ATF, to grant a convicted felon's application for relief from firearms disabilities when it is established to the Secretary's satisfaction that the preconditions for relief have been satisfied. However, in every annual appropriations law since 1992, Congress has expressly prohibited ATF from expending any appropriated funds to investigate or act upon requests for relief from firearms disabilities. That appropriations bar suspends ATF's authority to grant relief from firearms disabilities. The reasons underlying that prohibition are clear: Congress determined that rearming convicted felons creates an unwarranted danger to the public, and that taxpayer funds and government resources should not be devoted to an inquiry so fraught with danger.

In disabling ATF from acting, Congress did not empower district courts to assume the agency's role. A district court's sole authority under Section 925(c) is to review an ATF denial of relief to determine whether it

is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See 5 U.S.C. 706. Section 925(c) has never given district courts authority to remove a convicted felon's firearms disabilities based on its own independent assessment that the preconditions for relief have been satisfied and that the applicant warrants a favorable exercise of discretion.

Moreover, the appropriations bar effectively precludes a judicial award of relief from firearms disabilities. An essential predicate for judicial review under Section 925(c) is an ATF "denial" of relief. Because the appropriations bar prevents ATF from acting on applications for relief, ATF may neither grant nor deny such an application. Without an ATF "denial," a court has no authority to act under Section 925(c).

Even if ATF's failure to act on an application triggered judicial review under Section 925(c), that would simply lead to a consideration of whether ATF's failure to act on the application was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. ATF's compliance with a statutory directive not to use its resources to process applications for relief is none of those things.

Allowing district courts to grant relief from firearms disabilities to convicted felons would also create the very dangers that Congress sought to avert by imposing a bar on the use of appropriated funds by ATF. District courts are not in a position to undertake the sort of investigations that would be required to determine whether an applicant's firearms disabilities should be removed, and they have no greater ability than ATF to ensure that felons who have their firearms privileges restored will not pose an unacceptable risk to the public.

ARGUMENT

A DISTRICT COURT DOES NOT HAVE AUTHORITY TO GRANT A CONVICTED FELON RELIEF FROM FEDERAL FIREARMS DISABILITIES

The Fifth Circuit in this case held that a district court has authority to grant relief from federal firearms disabilities to persons who have been convicted of a felony. That holding is incorrect. As six courts of appeals have concluded, ATF's annual appropriations law prevents ATF from acting on applications for such relief, and a district court does not have authority to assume the responsibility that Congress removed from ATF. *Pontarelli* v. *United States*, No. 00-1268, 2002 WL 480107, at *6 (3d Cir. Mar. 29, 2002) (en banc) (overruling *Rice* v. *United States*, 68 F.3d 702 (3d Cir. 1995)); *Mullis* v. *United States*, 230 F.3d 215, 219-221 (6th Cir. 2000); *McHugh* v. *Rubin*, 220 F.3d 53, 57-61 (2d Cir. 2000); *Saccacio* v. *ATF*, 211 F.3d 102, 104-105 (4th Cir. 2000); *Owen* v. *Magaw*, 122 F.3d 1350, 1353-1354 (10th Cir. 1997); *Burtch* v. *United States Dep't of the Treasury*, 120 F.3d 1087, 1090 (9th Cir. 1997).

A. ATF's Appropriations Law Suspends ATF's Authority To Act On Applications For Relief From Firearms Disabilities

Section 922(g)(1) of Title 18 makes it unlawful for any person convicted of a felony to transport, possess, or receive firearms or ammunition. Congress's purpose in enacting that provision was "broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous." *Barrett* v. *United States*, 423 U.S. 212, 218 (1976). Congress's constitutional authority to enact that prohibition is well established. See *Lewis* v. *United States*, 445 U.S. 55, 65-66 & n.8 (1980).

In 18 U.S.C. 925(c), Congress authorized the Secretary of the Treasury, acting through ATF, to grant convicted felons relief from their firearms disabilities when "it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." In every ATF appropriations statute passed since 1992, however, Congress has provided that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." 106 Stat. 1732; 107 Stat. 1228; 108 Stat. 2385; 109 Stat. 471; 110 Stat. 3009-319; 111 Stat. 1277; 112 Stat. 2681-485; 113 Stat. 434; 114 Stat. 2763A-129; 115 Stat. 519. That appropriations bar has the effect of suspending the Secretary's authority under Section 925(c) to grant to convicted felons relief from their firearms disabilities.

This Court has repeatedly held that Congress has authority under the Constitution to suspend or repeal substantive law through the enactment of an appropriations law. *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992); *United States* v. *Will*, 449 U.S. 200, 222 (1980); *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940); *United States* v. *Mitchell*, 109 U.S. 146, 150 (1883). In *Robertson*, the Court explained that "although repeals by implication are especially disfavored in the appropriations context, * * * Congress nonetheless may amend substantive law in an appropriations statute, as long as it does so clearly." 503 U.S. at 440. Similarly in *Will*, the Court stated that "when Congress desires to suspend or repeal a statute in force, 'there can be no doubt that * * * it could accomplish

its purpose by an amendment to an appropriation bill, or otherwise.'" 449 U.S. at 222. "The whole question depends on the intention of Congress as expressed in the statutes." *Ibid.*

Congress could not have expressed more clearly its intent to suspend ATF's authority to grant relief from firearms disabilities under 18 U.S.C. 925(c). The appropriations bar expressly prevents ATF from using appropriated funds to investigate or act on applications from relief. Thus, "while the annual appropriations statutes speak in terms of the ATF's ability to spend appropriated funds, their effect on the agency is obvious: It may neither grant nor deny applications falling within the scope of the funding restriction." *McHugh*, 220 F.3d at 58.[4]

The legislative history of the appropriations bar confirms that Congress intended to suspend ATF's authority to act on applications for relief from firearms disabilities. See *Dickerson*, 310 U.S. at 561. The legislative history reveals that Congress enacted that prohibition because it concluded that determining whether to grant relief "is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made," and because it believed that the government's scarce resources "would be better utilized to crack down on

[4] ATF may not use fees collected from applicants or any other source to process applications for relief from firearms disabilities. Under 31 U.S.C. 3302(b), any funds collected in the form of fees would have to be deposited in the Treasury, and under the Appropriations Clause of the Constitution (Article I, Section 9, Clause 7) and the Anti-Deficiency Act (31 U.S.C. 1341), money may not be drawn from the Treasury unless it has been appropriated by an Act of Congress. See *OPM* v. *Richmond*, 496 U.S. 414 (1990). Gov't Reply Pet. 8.

violent crime." S. Rep. No. 353, *supra*, at 19-20. The bar in each annual appropriations law thus reflects Congress's considered judgment that "those who commit felonies should not be allowed to have their right to own a firearm restored." H.R. Rep. No. 183, *supra*, at 15.[5]

Thus, while the relief provision in 18 U.S.C. 925(c) has not itself been repealed, Congress has deliberately and unequivocally suspended the Executive's ability to implement it. Until such time as Congress removes the statutory restriction, ATF is legally prohibited from using its resources to process applications for relief from firearms disabilities. As the Second Circuit concluded in *McHugh*, "Congress could not have stated more clearly that the ATF is prohibited from acting on applications submitted by individuals pursuant to § 925(c)." 220 F.3d at 58. Accord, *e.g.*, *Mullis*, 230 F.3d

[5] See also H.R. Rep. No. 618, 102d Cong., 2d Sess. 14 (1992) ("After ATF agents spend many hours investigating a particular applicant for relief, there is no way to know with any certainty whether the applicant is still a danger to public safety." The resources spent on investigations therefore "would be better utilized by ATF in fighting violent crime."); 138 Cong. Rec. 24,490 (1992) (Sen. Chafee) ("Dozens of convicted felons who have had their gun rights reinstated have been rearrested on new charges, including attempted murder, robbery, and child molestation. * * * At a time when gun violence is exacting terrible costs upon our society, it seems absolutely crystal clear to me that the government's time and money would be far better spent trying to keep guns out of the hands of convicted felons, not helping them regain access to firearms."); *id.* at 24,494 (Sen. Lautenberg) ("Criminals granted relief have later been rearrested for crimes ranging from attempted murder to rape and kidnaping. * * * ATF agents have better things to do than conduct in-depth investigations on behalf of convicted felons.").

at 221; *Owen*, 122 F.3d at 1353; *Burtch*, 120 F.3d at 1090.

B. Section 925(c) Has Never Authorized District Courts To Remove A Convicted Felon's Firearms Disabilities Based On Its Own Independent Assessment That The Preconditions For Relief Have Been Satisfied And Relief Is Warranted

Congress did not suspend ATF's authority to provide relief from firearms disabilities only to have district courts assume the agency's role. Prior to its suspension, Section 925(c) assigned broad discretion to the Secretary of the Treasury to determine whether a convicted felon's application for relief should be granted: Under Section 925(c), relief from firearms disabilities could be granted if it was established to the *Secretary's* satisfaction that the statutory preconditions for relief were satisfied. 18 U.S.C. 925(c). Those preconditions were not only that the applicant would not be likely to act in a manner dangerous to public safety, but also that the granting of relief "would not be contrary to the public interest." *Ibid.* Those preconditions, moreover, limited the Secretary's authority to grant relief, not to deny it. *Bowen* v. *Yuckett*, 482 U.S. 137, 148 (1987). Even when the Secretary was satisfied that the preconditions for relief were met, Section 925(c) provided only that the Secretary "may" grant relief, not that he was required to do so, *ibid.*; accord 27 C.F.R. 178.144(d), and it "impos[e]d no limitations on the factors that [he] [could] consider in determining who, among the class of eligible [applicants], should be granted relief." Cf. *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996).

Section 925(c) has never assigned any comparable authority to the district courts. It does not provide that

relief may be granted to a convicted felon when it is established "to the court's satisfaction" that the statutory prerequisites for relief have been satisfied. Nor does it give courts authority to determine what the "public interest" entails under Section 925(c), to decide when the granting of relief under that Section would be consistent with the public interest, or to make policy judgments concerning who among the class of eligible persons should be granted relief.

Instead, courts play a far more limited role under Section 925(c). A person "whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial." 18 U.S.C. 925(c). Under Section 925(c), a district court is therefore "a court of review, not one of first view." *Oklahoma Tax Comm'n* v. *Chicasaw Nation*, 515 U.S. 450, 457 (1995). Section 925(c), like other statutory review provisions, incorporates the standards for judicial review set forth in the Administrative Procedure Act, see *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 282 (1987), including the rule that a court ordinarily may set aside agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A); see *Citizens to Pres. Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 413-414 (1971); S. Rep. No. 583, *supra*, at 26-27; *Bagdonas* v. *Department of Treasury*, 93 F.3d 422, 425 (7th Cir. 1996); *Bradley* v. *ATF*, 736 F.2d 1238, 1240 (8th Cir. 1984). Under that standard, a court considers only "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Overton Park*, 401 U.S. at 416. It may not "substitute its judgment for that of the agency." *Ibid.*;

see also *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985) (under the APA, "[t]he reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry"). Moreover, "[i]n applying that standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973).

Thus, from the beginning, Section 925(c) allocated to the Secretary the authority to decide whether to grant a convicted felon's request for relief from firearms disabilities, and allocated to the courts the more limited role of determining whether the Secretary's denials of relief are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. A district court has never had any freestanding authority under Section 925(c) to determine independently and in the first instance that a convicted felon has satisfied the prerequisites for relief from his firearms disabilities and should be granted such relief as a matter of discretion. That division of responsibility between ATF and the courts reflects Congress's judgment that "[a]dministrative agencies are far better suited than are courts to make determinations based on the broad policy question of what is in the 'public interest.'" *McHugh*, 220 F.3d at 59.

When Congress suspended the Secretary's authority under Section 925(c) to grant convicted felons relief from firearms disabilities, it did not invest district courts with any new authority. Thus, just as before the enactment of the annual appropriation statutes, district courts possess only the authority to determine whether the Secretary's exercise of the *Secretary's* discretion

respecting an application for relief is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. They have no authority to construct a record from scratch and to assess independently whether the preconditions for relief from firearms disabilities have been satisfied—much less to decide, if the preconditions for relief have been satisfied, whether to grant relief as a matter of discretion. In exercising that authority in this case, the district court assumed a role that courts have never had under Section 925(c).

C. The Appropriations Bar Effectively Precludes A Court From Awarding A Convicted Felon Relief From Firearms Disabilities

1. The appropriations bar not only precludes ATF from "investigat[ing] and act[ing] upon" an application for relief; it also effectively precludes a court from entering a judgment that relieves a convicted felon of his firearms disabilities. Judicial review is available under Section 925(c) only when ATF issues a "denial" of an application. In the context of Section 925(c), the meaning of a "denial" is "an adverse determination on the merits." *Burtch*, 120 F.3d at 1090; *Saccacio*, 211 F.3d at 104; *Pontarelli*, 2002 WL 480107, at *7. Because of the appropriations law, ATF no longer has authority to "deny" applications for relief under Section 925(c). Indeed, the appropriations law forbids ATF from taking *any action* on applications for relief: it may neither grant nor deny them. The appropriations law therefore not only suspends ATF's authority to act on applications for relief, it simultaneously removes any basis for obtaining the essential predicate for judicial review—an ATF "denial" of an application. Without an ATF denial, there is no role for the judiciary to play under Section 925(c).

That barrier to judicial action under Section 925(c) may not be circumvented by characterizing ATF's failure to act on an application as a "denial" of relief. The APA expressly distinguishes between agency action that takes the form of a "denial" of "relief" and agency action that takes the form of a "failure to act." 5 U.S.C. 551(13). Because Section 925(c) authorizes judicial review only when there has been an ATF denial of relief, and not when there has been a failure to act, "[t]he federal district courts are no more empowered [under Section 925(c)] than is the ATF to review individuals' applications for relief from federal firearms disabilities." *McHugh*, 220 F.3d at 59; see *Pontarelli*, 2002 WL 480107, at *7 ("an inability to grant a request is not commonly understood to constitute a 'denial'"); *Webster's Third New International Dictionary* 602 (3d ed. 1993) (defining "denial" as a "refusal to grant, assent to, or sanction," or a "rejection of something requested, claimed, or felt to be due"). Cf. *Your Home Visiting Nurse Servs., Inc.* v. *Shalala*, 525 U.S. 449, 453 (1999) (declining to equate a "*refusal* to make a determination," with a "final determination").

The APA does generally authorize judicial review of final agency action that takes the form of a "failure to act" when there is no other adequate remedy in a court. 5 U.S.C. 551(13), 704. But respondent sought judicial review under Section 925(c), not under the provision of the APA authorizing review of an agency's failure to act. Respondent's decision not to seek review of ATF's failure to act under the APA is understandable. The remedy for an impermissible failure to act is a judicial order "compell[ing] agency action," not de novo judicial action as respondent sought. 5 U.S.C. 706(1). Moreover, the APA authorizes relief for a failure to act only when agency action is "unlawfully withheld or unreasonably delayed." *Ibid.* "Given Congress's explicit instruction that the ATF should not spend any appropriated funds to process applications for the removal of firearm disabilities, [an applicant] could hardly argue that the ATF has acted unlawfully or unreasonably in failing to process his application." *Mullis*, 230 F.3d at 219; cf. *GTE Sylvania, Inc.* v. *Consumers Union*, 445 U.S. 375, 386 (1980) (agency documents are not "*improperly* withheld" within the meaning of the Freedom of Information Act when the agency has been subject to a district court injunction barring disclosure).

2. Even if ATF's failure to act on an application were treated as a "denial" of relief, that would simply lead to an inquiry into whether the "denial" was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). "ATF's decision to comply with a congressional directive cannot be said to meet this standard." *McHugh*, 220 F.3d at 61. To the contrary, if ATF had proceeded to decide respondent's application on the merits, it would have *violated* its duty to act "in accordance with law." Thus, if a court had authority to review ATF's failure to act on an application for relief from firearms disabilities under Section 925(c), the court would be required to sustain ATF's refusal to act on the ground that the refusal was required by the applicable appropriations law. A court could not condemn ATF's failure to act as unlawful, much less make its own independent determination that an applicant should be relieved of his firearms disabilities.

3. The district court's limited authority under Section 925(c) to "admit additional evidence where failure to do so would result in a miscarriage of justice" does not detract from that conclusion. The authority to admit "additional" evidence assumes that there is al-

ready evidence in an administrative record compiled by the agency, and thus merely permits a district court "to supplement the record," not "to create the record in the first place." *Pontarelli*, 2002 WL 480107, at *6. The appropriations laws, however, bar the agency from conducting the "investigat[ion]" necessary to develop the evidence for an administrative record. Moreover, a court's authority to admit "additional" evidence may be exercised only when the failure to do so would result "in a miscarriage of justice." That constraint on the admission of evidence further "suggests that the initial adjudication of applications is limited to the Secretary of the Treasury." *McHugh*, 220 F.3d at 59.

In any event, the authority to admit additional evidence exists as a component of a statutory scheme that makes an ATF "denial" of relief a precondition to judicial review, and limits judicial authority to determining whether such a denial is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. 706(2)(A). Thus, the district court's authority to admit "additional" evidence may be exercised only in connection with judicial review of an ATF "denial," and then only for the purpose of assisting the court in deciding whether such a denial is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. A court may not use that authority to build a record from scratch for the purpose of determining independently whether an application for relief should be granted. See S. Rep. No. 583, 98th Cong., 2d Sess. 27 (1984) (stating that in a case calling for the admission of additional evidence, "the court might in its discretion request the presence of an agent representing the Secretary, and stay the action for a suitable time to permit the Secretary to review his finding in light of

the additional evidence. It would then proceed if that evidence did not alter the Secretary's determination.").

D. Judicial Consideration Of Applications For Relief From Firearms Disabilities Would Defeat The Purposes Of The Appropriations Bar

A court's assumption of authority to grant convicted felons relief from their firearms disabilities would also be inconsistent with Congress's reasons for suspending ATF's authority. Congress barred ATF from granting such relief because it believed that ATF could easily make mistakes that could have terrible consequences for innocent members of the public and because it believed that taxpayer money should not be spent on a task that is so fraught with danger. See pp. 4, 12-13 & note 5, *supra*. Those concerns are not diminished by shifting responsibility for decisions from ATF to federal district courts.

Before making a decision on whether to grant a convicted felon relief from firearms disabilities, ATF conducted a thorough investigation. It interviewed the applicant, his references, probation officer, employers, neighbors, and friends. *Pontarelli*, 2002 WL 480107, at *11. Indeed, before Congress enacted the funding restriction in 1992, ATF spent "approximately 40 man-years" annually to investigate and act upon applications filed pursuant to Section 925(c). S. Rep. No. 353, *supra*, at 19-20. Notwithstanding that intensive effort, Congress feared that there was still too great a risk that ATF would mistakenly remove firearms disabilities from persons who would pose a danger to the public.

There is no reason to expect that judicial proceedings could reduce that risk. If anything, judicial proceedings

would be less suited to guard against the risk that mistakes will be made, with potentially devastating consequences. As the Sixth Circuit explained in *Mullis*, "[w]hile district courts are well equipped to make credibility judgments and factual determinations, they are without the tools necessary to conduct a systematic inquiry into an applicant's background." 230 F.3d at 219. Rather than conducting a thorough background investigation, a district court must necessarily rely largely on the information that the parties furnish. The applicant would typically supply the district court "only with contacts who will supply positive information concerning the applicant's record and reputation." *Ibid.* At the same time, the appropriations law prevents ATF from conducting an investigation that could counter the evidence that the applicant presents. As a consequence, "the court would only be able to conduct a very one sided inquiry, relying largely on letters of recommendation and testimony from individuals hand selected by an applicant." *Id.* at 219-220. That process is particularly ill-suited to protecting the public from the dangers that Congress sought to avert. At the very least, it would not provide any greater protection against the risks associated with granting relief than the ATF investigations that Congress deemed inadequate.

Nor would shifting responsibility from ATF to the courts allay Congress's concern that continued processing of applications for relief from firearms disabilities consumes taxpayer money and diverts government resources that would be better spent on law enforcement. In the context of the 1996 version of the appropriations bar, Senator Simon, a sponsor of the original appropriations bar, made that very point. He explained that, if courts assumed ATF's role in processing applications for relief, "[i]nstead of wasting

taxpayer money and the time of ATF agents, which could be much better spent on important law enforcement efforts * * *, we would now be wasting court resources and distracting the courts from consideration of serious criminal cases." 142 Cong. Rec. 27,066 (1996). He further emphasized that the goal of the appropriations bar "has always been to prohibit convicted felons from getting their guns back—whether through ATF or the courts. It was never our intention to shift the burden to the courts." *Ibid.*

Thus, a court's assumption of authority to provide relief from firearms disabilities cannot be reconciled with Congress's decision to suspend ATF's authority to grant such relief. As the Tenth Circuit concluded in *Owen*, "[t]o infer that Congress intended to transfer this important and subjective task to the courts simply flies in the face of Congress' statements." 122 F.3d at 1354.

E. Congress's Restoration Of ATF's Authority To Remove The Firearms Disabilities Of Corporations Confirms That Courts Lack Authority To Remove The Firearms Disabilities Of Individuals

The history of Congress's funding for investigating and acting upon corporate applications for relief from firearms disabilities confirms that courts do not have authority to act upon applications for relief filed by individuals. The initial appropriations bar prohibited ATF from investigating or acting upon any applications for relief from firearms disabilities. In the very next annual appropriations law, Congress provided funding for ATF to investigate and act upon applications filed by corporations, but continued to withhold funding for investigating or acting upon applications filed by indivi-

duals. Every subsequent appropriation has maintained that distinction. See p.3 & note 2, *supra*.

If the original appropriations bar had simply shifted responsibility for processing applications from ATF to the courts, there would have been no reason for Congress to restore ATF's authority to investigate and act upon applications for relief filed by corporations. The only explanation for that restoration of authority is that Congress intended for corporations, but not individuals, to have the opportunity to have their firearms privileges restored. *Pontarelli*, 2002 WL 481017, at *7.

F. The Court Of Appeals' Reasoning Is Unpersuasive

The Fifth Circuit gave several reasons for concluding that a court has authority to grant convicted felons relief from their firearms disabilities. None is persuasive.

1. While acknowledging that cases such as *Will* and *Dickerson* establish that Congress may suspend the operation of a federal statute through an appropriations law, the court of appeals sought to distinguish those cases on the ground that they involved the repeal of "financial" rights. Pet. App. 7a-8a. But those cases announced a categorical rule that Congress may suspend the operations of a statute through an appropriations law. *Will*, 449 U.S. at 222; *Dickerson*, 310 U.S. at 555. They did not purport to limit that principle to appropriations laws that affect financial rights. *Ibid.* Moreover, in *Robertson*, the Court applied the principle that Congress may suspend or amend a statute through an appropriations law in a context that did not involve financial rights. In that case, the Court held that a provision in an appropriations law effectively amended a federal environmental statute. *Robertson*, 503 U.S. at 440. There is therefore no basis for the court of appeals'

view that Congress may only affect financial rights through an appropriations bill.

2. The Fifth Circuit deemed it significant that Congress had reenacted the ATF appropriations bar several times, "with the resulting reality of the effective non-temporary suspension of statutorily created rights." Pet. App. 9a. Under this Court's controlling precedents, however, the question whether the operation of substantive law is suspended by passage of an appropriations law is one of legislative intent. *Will*, 449 U.S. at 222; see pp. 11-12, *supra*. Here, it is abundantly clear that Congress intended through each annual appropriations law to suspend the operation of Section 925(c). The number of appropriations statutes does nothing to detract from that inference. To the contrary, the accumulation of the appropriations bars only makes congressional intent to suspend the operation of Section 925(c) all the more emphatic. See *Dickerson*, 310 U.S. at 561.

Moreover, under Section 925(c), convicted felons have never had a "right[]" (Pet. App. 9a) to have their firearms disabilities removed. Instead, prior to its suspension, Section 925(c) granted to the Secretary a discretionary power to lift the firearms bar, and to do so only if it was established, to the *Secretary's* satisfaction, that an applicant would not be likely to act in a manner dangerous to public safety and that granting relief would not be contrary to the public interest. There is every reason to give full effect to an explicit statutory restriction on the exercise of such a discretionary authority by an Executive Branch official.

3. The court of appeals also viewed it as significant (Pet. App. 6a, 9a) that the Congress that enacted the first of the annual appropriations bars failed to enact the Stop Arming Felons Act (SAFE), a bill that would

have eliminated the relief provision altogether. See 138 Cong. Rec. 4184 (1992). But failed legislative proposals are almost always an unreliable basis for discerning Congress's intent in enacting a different bill. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 167 (1994). "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency of N. Cook County* v. *Army Corps of Engineers*, 531 U.S. 159, 170 (2001). Congress may well have failed to pass the SAFE bill because it preferred to address the merits of permitting felons to apply for removal of firearms disabilities annually, rather than resolving the issue on a more permanent basis. *Pontarelli*, 2002 WL 480107, at *10. Congress may also have been concerned about the SAFE bill's provision barring felons convicted under state law from possessing firearms even when the States in which they were convicted restored their civil rights. *Ibid.* The reason that Congress failed to enact SAFE, however, is ultimately unknowable. That is why Congress's intent must be derived from the laws that Congress enacted, and not from bills that it did not enact. Here, the laws that Congress has enacted—Section 925(c) and each annual appropriations law—reveal that Congress intended to preclude ATF from granting relief from firearms disabilities, and that it did not intend for the courts to assume the agency's role.

4. Finally, the court of appeals observed that respondent had exhausted his administrative remedies. See Pet. App. 9a & n.20. However, respondent's exhaustion of administrative remedies simply begs the question whether, following such exhaustion, the district court had authority to determine independently that respondent was entitled to relief from his firearms

disabilities. As discussed above, the court had no such authority.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APRIL 2002

Supreme Court, U.S.
FILED
JUN 14 2002
OFFICE OF THE CLERK

No. 01-704

IN THE

Supreme Court of the United States

United States of America, et al.,

Petitioners,

v.

Thomas Lamar Bean,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE RESPONDENT

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June 14, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTION PRESENTED

It is a federal crime for a person previously convicted of a crime punishable by imprisonment for a term exceeding one year to possess a firearm. There are a variety of exceptions, however, including the Secretary of the Treasury's power under 18 U.S.C. 925(c) to grant relief from this disability. The statute grants an express right to judicial review.

The question presented is whether annual appropriations measures barring the Bureau of Alcohol, Tobacco, and Firearms from acting upon applications for relief from federal firearms disabilities also impliedly repeal the right to judicial review conferred by 18 U.S.C. 925(c).

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8 U.S.C. 1160(e)(3)(A) 38
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18 U.S.C. 921(a)(20)(B) 2
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30 U.S.C. 1416(d) 47
42 U.S.C. 1395cc(h)(1) 37
42 U.S.C. 1395oo(a)(1)(A)(i) 39
42 U.S.C. 1983 20
42 U.S.C. 6393(a)(4) 38
42 U.S.C. 6976(a) 38
42 U.S.C. 7194(b)(1) 38
42 U.S.C. 7661d(b)(2) 38
42 U.S.C. 8433(d)(2)(B) 47
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Act of Nov. 28, 2001, Pub. L. No. 107-76, § 721, 115 Stat. 704 19
Act of Oct. 11, 1996, Pub. L. No. 104-294, § 607(c), 110 Stat. 3488 23
Act of Sept. 30, 1996, Pub. L. No. 104-208, § 658(c), 110 Stat. 3009 23
Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, § 1107, 115 Stat. 2230 19
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Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-319 24
27 C.F.R. 178.144(c)(1) 26
27 C.F.R. 178.144(d) 28
27 C.F.R. 178.42-.91 6
27 C.F.R. 178.44(i)(3) 37
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142 Cong. Rec. 27,066 (1996) 25
142 Cong. Rec. H7678 (daily ed. July 17, 1996) 24
142 Cong. Rec. S10,139 (daily ed. Sept. 10, 1996) 25
143 Cong. Rec. H1292 (daily ed. Apr. 8, 1997) 24
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David C. Morrison, *How Even the Strange Can Get Rearmed*, NAT'L J., Mar. 21, 1992, at 702 45
Editorial: *Felon Gun Program Should Be Disbanded*, CHI. SUN-TIMES, July 1, 1992, at 31 3
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H.R. 3455, 104th Cong., 2d Sess. § 5 (1996) 23
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H.R. 3954, 105th Cong., 2d Sess. § 3 (1998) 23
H.R. 4066, 106th Cong., 2d Sess. § 301(a)(1) (2000) 23
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KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE (3d ed. 1995 Supp.) 50
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S. 995, 106th Cong., 1st Sess. § 311 (1999) 23
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S. 1400, 103d Cong., 1st Sess. § 3(a) (1993) 23
S. 1632, 104th Cong., 2d Sess. § 5 (1996) 23
S. 2304, 102d Cong., 2d Sess. § 3(a) (1992) 23, 45
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S. 2338, 106th Cong., 2d Sess. § 301(a)(1) (2000) 23
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BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 253 F.3d 234.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2001. The petition for a writ of certiorari was filed on November 19, 2001, and was granted on January 22, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions appear *infra* at 1a-2a.

STATEMENT

I. Statutory Background

1. It is a federal crime for "any person * * * who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year * * * to * * * possess * * * any firearm * * * shipped or transported in interstate or foreign commerce." 18 U.S.C. 922(g)(1) ("Section 922(g)(1)").[1] Since 1965, however, Congress has cabined the statute's sweeping terms with an express "[e]xception[]" that offers "[r]elief from disabilities." 18 U.S.C. 925 (title). "A person who is prohibited from possessing * * * firearms * * * may make application to the Secretary [of the Treasury] for relief from the disabilities imposed by Federal laws." *Id.* § 925(c) ("Section 925(c)"). The Secretary "may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public

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[1] This section and related provisions apply equally to the possession of "ammunition," as well as to the "receipt" of firearms and ammunition. Respondent uses the terms "firearm" and "possess" for ease of reference.

interest." *Id.* The Secretary has directed that Section 925(c) applications be considered by the Bureau of Alcohol, Tobacco, and Firearms ("ATF") (see 27 C.F.R. 178.144(b)), although he has of course not renounced his personal authority to grant relief.

Administrative action by the Secretary has long been subject to judicial review. Under Section 925(c) as originally enacted, the federal courts held that a relatively narrow form of review was available under the Administrative Procedure Act ("APA"). *Kitchens* v. *Department of Treasury*, 535 F.2d 1197, 1199-1200 (CA9 1976) (holding that review is limited to "an examination of the statement of the reasons upon which the Director made his decision to deny relief"). In 1986, Congress added a special judicial review provision to "improve the ability of the deserving members of the public to obtain relief from the legal disqualification from firearms ownership." H.R. Rep. No. 495, 99th Cong., 2d Sess. 28 (1986). "Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial." 18 U.S.C. 925(c). Although APA review is generally limited to "the administrative record already in existence" (*Camp* v. *Pitts*, 411 U.S. 138, 142 (1973)), Congress provided in Section 925(c), by contrast, that "[t]he court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice."

Section 925(c) is only one of four broad exceptions to the criminal sanction of Section 922(g)(1). The others are set forth at 18 U.S.C. 921(a)(20). Congress has exempted an array of white-collar crimes – "any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices." *Id.* § 921(a)(20)(A). Also exempt are virtually all state-law misdemeanors. *Id.* § 921(a)(20)(B). Finally, in 1986, Congress overturned *Dickerson* v. *New Banner Institute*, 460 U.S. 103 (1983), to exempt "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored" under state law unless firearms rights are "expressly" withheld. 18 U.S.C. 921(a)(20). This relief is available through various procedures in most of the country. Many states grant relief specifically by lifting disabilities automatically upon the expiration of an individual's state sentence or by permitting application to a state judge. See *infra* at 15a (cataloging state statutes).[2]

2. In 1992, ATF came under heavy criticism for devoting excessive resources to investigating Section 925(c) petitions and for granting relief too freely. A widely publicized report by *Amicus* Violence Policy Center ("VPC") asserted that, from 1985 to 1991, ATF annually spent between $2.75 and $4.25 million to process Section 925(c) applications. Moreover, ATF granted these applications at a very high rate (approximately one in three), including for some persons who had been convicted of violent felonies. Sample data furthermore suggested that ATF granted relief in some cases (approximately two-and-a-half percent of the granted applications) in which the applicant went on to commit another crime. See generally VPC, *Putting Guns Back into Criminals' Hands: 100 Case Studies of Felons Granted Relief from Disability Under Federal Firearms Laws* (March 1992). Substantial pressure developed to terminate the ATF program. *E.g.*, Editorial: *Felon Gun Program Should Be Disbanded*, CHI. SUN-TIMES, July 1, 1992, at 31 ("It is outrageous in the extreme for the federal government to shell out millions of dollars helping convicted felons to get their hands on guns - legally! - under a program that offers 'relief' to felons with the 'disability' of being unable to own weapons."); *Morning Edition: BATF Felon Gun Program A Campaign Issue?* (NPR radio broadcast, July 30, 1992) (reporting ATF Director was "embarrassed by the fact that his bureaucrats have to spend $4 million of taxpayer's money every year to determine which felons should be allowed to carry guns and which should not").

Congress responded in a targeted fashion to this criticism that the costs of the ATF administrative relief program were not worth the benefits received. It did not eliminate any of the four

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[2] For a complete list of state statutes restoring civil rights to felons as of 1993, see Pet. Br. App., No. 93-445, *Beecham* v. *United States*.

exceptions to federal firearms disabilities or modify or repeal any of the rights and powers conferred by Section 925(c), such as individuals' right to submit requests for relief, the Secretary's personal authority to grant relief, or the right to judicial review. Although Congress considered a number of such measures, it opted against those changes. See *infra* at 23-25 (discussing proposals), 8a-14a (reproducing proposals). Instead, Congress reallocated the restoration program's budget to a different program designed to combat violent crime – specifically, it shifted the funds to the Armed Career Criminal Apprehension Program ("ACCAP") – and prohibited the ATF from using other funds to grant applications for relief. See generally S. Rep. No. 353, 102d Cong., 2d Sess. 20 (1992) (summarizing 1993 ACCAP appropriations, including 40 full-time equivalent employees and $3.75 million redirected from firearms disability relief operations).[3] In that year and subsequently, Congress included a "proviso" to ATF's budget (as opposed to the budget of the Department of the Treasury generally): "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732, Unnumbered Section: "Bureau of Alcohol, Tobacco and Firearms – Salaries and Expenses."[4]

There is very little legislative history regarding these appropriations. Neither the full House nor the full Senate has ever expressed its views; the relevant congressional reports are limited to statements by the respective Appropriations Committees. Nor does any report contain even the briefest discussion of Section 925(c)'s judicial review provision. The reports for some of

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[3] This reallocation of funds was necessary to meet the Fiscal Year 1993 appropriation measure's requirement that "no fewer than 1440 full-time equivalent positions * * * be allocated for the [ACCAP]." 106 Stat. 1732.

[4] Subsequent ATF appropriations have exempted corporate applications from the funding prohibition, see, *e.g.*, 107 Stat. 1228, although very few such applications are ever filed.

the appropriations measures – although notably not the Fiscal Year ("F.Y.") 1999 appropriation at issue in this case – briefly mention the withholding of funds. These passages indicate that the respective Appropriations Committees concluded that the benefits provided by the ATF program were insufficient to justify such large expenditures of funds, in part because ATF had restored firearms rights too freely, and should therefore be spent on a more worthy program. *E.g.*, S. Rep. No. 353, *supra*, at 19-20; H.R. Rep. No. 618, 102d Cong., 2d Sess. 13-14 (1992); see *infra* at 43-44 (quoting both reports), 3a-7a (reproducing all relevant excerpts from every annual report). As the United States advised this Court at the time the appropriations bar was initiated, quoting the 1992 House Report's statement that these funds "would be better utilized * * * in fighting violent crime," the annual appropriations reflect "Congress's choice not to fund firearms rights restoration procedures *during times of fiscal restraint*." Br. for the U.S., No. 93-445, *Beecham* v. *United States* 25 n.14 (emphasis added). Contra Pet. Br. 13, 21-23.

II. Factual Background and Procedural History

1. Respondent Thomas Bean's unimpeachable character, including his suitability to possess firearms, is established by the record and is not disputed by any party to this case. As subsequently found by the district court as a matter of fact (Pet. App. 34a-36a; see also J.A. 16-26 (written submissions), 52-60 (trial testimony)), respondent is a long-time resident of Orange County, Texas and a businessman in Port Arthur, Texas. He and his wife of forty years have two adult children. He "has never been charged with or convicted of a crime in the United States, except for minor traffic offenses." Pet. App. 34a. As confirmed by the sworn testimony of the local Chief of Police and Deputy Sheriff, both of whom have long been personally familiar with respondent's character, he indisputably is a person of "trustworthiness and good character" with a "reputation for being a law abiding citizen of the community." *Id.* 35a.

Particularly relevant to the relief that respondent seeks, he was, at the time of the events giving rise to this case, a licensed firearms dealer. ATF issues such a license, and continues it in

force, only if the licensee has complied with all federal firearms laws and has accurately maintained detailed records. See generally 18 U.S.C. 923; 27 C.F.R. 178.42-.91. The sworn trial testimony of the ATF inspector established that respondent was "a cooperative licensee" who maintained "excellent records." Pet. App. 35a. The local Chief of Police testified that respondent was "a cautious licensed firearms dealer." *Id.* "[H]e was very methodical; and if he had any suspicion or any doubt or anything that would indicate that something might not be quite right, he just simpl[y] wouldn't sell. He would not trade, he just wouldn't do it." J.A. 53-54.

2. On March 14, 1998, respondent attended a gun show in Laredo, Texas with three assistants. That evening, they planned to travel across the nearby Mexican border for dinner. Before doing so, they returned to their hotel and, in an abundance of caution, respondent "instructed his assistants to remove all firearms and ammunition from" his vehicle (Pet. App. 13a), so as not to "take anything across the border" (J.A. 40). The assistants, however, "inadvertently left approximately two hundred rounds of ammunition in plain view in the back" of the vehicle, where it was immediately seen by Mexican border officials. Pet. App. 13a. Although everyone in the vehicle was initially arrested, Mexican officials ultimately detained only respondent, whom they charged as the owner of the vehicle and the ammunition with the felony of introducing ammunition into the Republic of Mexico. *Id.* It is undisputed that respondent was unaware not only that "the ammunition was in the vehicle at the time he crossed the border," but also that "possession of ammunition was an offense in the Republic of Mexico." *Id.*

"Knowing that [respondent] could not read, speak, or understand the Spanish language," Mexican officials required him to sign a document in Spanish that he only later learned "amounted to a confession." Pet. App. 31a-32a. As a result, and without a trial, respondent was "convicted and sentenced to a term of imprisonment of five years in Mexico." *Id.* 32a.[5] He remained

[5] Mexico reacted to the outcry over these events by recategorizing the crime of introducing firearms or ammunition into that country as a misdemeanor for first-time offenders, although the change does not apply retroactively to respondent's case. Pet. App. 2a n.1.

incarcerated in a Mexican prison for four months until he was transferred to a U.S. penitentiary pursuant to an international treaty. *Id.* 13a. Within a month, Judge Fisher of the United States District Court for the Eastern District of Texas concluded based on a review of the record that respondent should be placed on supervised release. Ten months later, the court eliminated even those restrictions. *Id.* 13a-14a.

3. Pursuant to Section 925(c), respondent filed an application with the Secretary of the Treasury for permission to possess firearms and to regain his license as a firearms dealer. J.A. 27-32. As required by the applicable regulation (27 C.F.R. 178.144), the application detailed respondent's personal history (J.A. 27-28, 30-31) and the circumstances of his conviction (*id.* 28-29). Respondent also attached letters from two local Chiefs of Police, the local Sheriff, a local City Marshal, and a State Judge, each attesting to respondent's good character and suitability to possess firearms. *Id.* 16-26, 31. ATF, however, did not grant respondent the relief he requested. By letter, ATF advised respondent that, although federal law "provides the Secretary of the Treasury with the authority to grant relief from this disability," "[s]ince October 1992, ATF's annual appropriation has prohibited the expending of any funds to investigate or act upon applications for relief." *Id.* 33. The restriction governing respondent's application, the letter explained, "is located in Pub. L. No. 105-277, 112 Stat. 2681, containing ATF appropriations for fiscal year 1999." *Id.* 34. Based on this restriction, ATF "return[ed] [respondent's] application for restoration of Federal firearms privileges and the supporting documentation." *Id.*

4. Respondent then sought judicial review pursuant to Section 925(c). J.A. 8-15. The petition was assigned to Judge Fisher, who was familiar with the details of respondent's record and the circumstances of the Mexican conviction because he had overseen the imposition and then termination of respondent's supervised release. The parties briefed the government's motion to dismiss the petition for lack of jurisdiction, which asserted

that Congress had impliedly repealed Section 925(c) by restricting ATF's appropriations. The district court also held a hearing devoted to the legal and factual issues surrounding whether respondent's firearms privileges should be restored. *Id.* 38-60 (transcript excerpts). The government did not challenge the accuracy of respondent's proof. Nor, of particular note, did the government contend that the proof was insufficient to justify the district court's granting respondent relief from firearms disabilities under Section 925(c), suggest a need for a further investigation into respondent's background, or request that the matter be remanded to the Secretary.

In a detailed opinion, the district court concluded that it had jurisdiction to consider respondent's petition and determined that the petition should be granted under the plain terms of Section 925(c). Pet. App. 12a-38a. In response to the government's reliance on a supposed implied repeal of the statute's judicial review provision, the district court followed this Court's repeated holdings that "repeals by implication are 'strongly' disfavored" and that Congress's intent to do so through "an appropriation act" "must be clearly stated." *Id.* 17a (quoting *Johnson* v. *Robison*, 415 U.S. 361, 373-74 (1974), and citing *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992)). Nothing in the text of the appropriations statutes even obliquely suggests an intent to repeal the right to judicial review. Moreover, having "diligently searched the legislative history of both 18 U.S.C. § 925(c) and the Appropriations Acts," the district court found only "contradictory statements." *Id.* 20a. This is "a textbook case on why the courts should be hesitant to use legislative history to suspend any substantive right which is expressly available in statutes." *Id.* 27a. Not only does it depend on "whose side you represent as to which committee report you choose to employ and which committee report you choose to ignore," but committee reports lack authoritative force. *Id.* (citing *Pierce* v. *Underwood*, 487 U.S. 552, 567-68 (1988); *Wis. Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 621 (1991) (Scalia, J., concurring)). In any event, the district court concluded that the legislative history, when read fairly, reveals that "Congress was concerned with the ATF's inefficient and wasteful administrative review

process rather than a desire to curb the availability of relief itself" (*id.* 24a) and thus, as the appropriations measures state on their face, Congress "only intended the suspension of the ATF's ability to investigate or act upon applications for relief by individuals" (*id.* 26a). "If Congress 'intended' to change anything, it deleted administrative action from the statute, but otherwise left judicial relief available." *Id.* 24a.

The government's argument for an "implied repeal," the district court continued, was also "inconsistent with the totality of the statutory scheme." Pet. App. 25a. The relief provision has been an integral component of federal firearms law since 1965. Congress has repeatedly amended Section 925(c) without eliminating applicants' rights to request relief and to seek judicial review; to the contrary, "each time" Congress has modified the statute, it has done so "with a concern toward those persons who possess guns in a lawful manner but are denied possession of firearms because of unrelated felony convictions." *Id.* 24a. The legislative history of these amendments demonstrates Congress's determinations that "not all persons convicted of felonies should be denied firearms privileges forever" and that "the judiciary [should] give the final word on the appropriateness of a denial" of relief under Section 925(c). *Id.* 22a. Particularly significant, the government's position "ignores" Section 921(a)(20), which permits individuals to "obtain restoration of [their] federal firearm rights by operation of *state* law and without the involvement of *any* special ATF competency" (*id.* 24a-25a (citing *Caron* v. *United States*, 524 U.S. 308 (1998); *Beecham* v. *United States*, 511 U.S. 368, 371 (1994)) (emphases added)), such as through "'a general law stating that all rights shall be reinstated upon the service of a sentence'" or by authorizing officials to issue "certificates of restoration" (*id.* 25a (quoting *McGrath* v. *United States*, 60 F.3d 1005, 1008 (CA2 1995), *cert. denied*, 516 U.S. 1121 (1996))). Therefore, even setting aside the express delegation of authority by Congress to the Secretary of the Treasury himself to grant relief personally under Section 925(c), Congress plainly does not regard ATF as "solely and specially capable" of making the determination whether firearms rights should be restored. *Id.*

Nor did Congress repeal applicants' right to judicial review through the appropriations acts. Neither the text nor the legislative history suggests such an intent. To the contrary, ATF's failure to grant respondent relief "constitutes a de facto denial of an application such that a United States district court may consider a petition for judicial review of the denial." Pet. App. 30a. Section 925(c) merely requires applicants to exhaust their administrative remedies, a requirement that is satisfied at the point that it "would be wholly futile or inadequate" to continue to pursue administrative action. *Id.* Nor could Congress have intended to "rigidly" require administrative exhaustion, given that "it gave the district courts discretion to create or supplement the administrative record when necessary to avoid a miscarriage of justice." *Id.*

The courts, moreover, are fully equipped to exercise the jurisdiction that Congress conferred in Section 925(c). Not only does the statute ultimately call for an "adjudicative" determination (Pet. App. 28a), but "part of the day-to-day role of the court is to make character determinations of the individuals before it" (*id.* 29a). Importantly, the courts' role in exercising judicial review under Section 925(c) can be tailored to the "concerns expressed by Congress" in the appropriations acts. *Id.* 28a. In a judicial proceeding, "the burden would be on the applicant" to present sufficient evidence regarding matters such as his "record, reputation, and the underlying reason for the disability"; if the applicant failed "to secure *all* the necessary evidence," relief would simply be denied. *Id.* (emphasis added). In making this determination, the district court would have access to information on "how the ATF had conducted its investigations in the past." *Id.* 29a. Among other things, this process "shift[s] the financial burden from the government to the applicant" (*id.* 28a), including paying the cost of any "investigative work [that] needs to be done" (*id.* 29a).

On the substance of the petition, the district court found it incontestable – and indeed *uncontested* – that respondent was entitled to relief from firearms disabilities. The court summarized the testimony of the several live witnesses – including an ATF inspector and local police officials – regarding respondent's established and consistent record as a law-abiding citizen, person of unimpeachable character, and respected firearms dealer. Pet. App. 34a-36a; see also *supra* at 5-6. The undisputed testimony at trial notably included the local Sheriff's assurance to the court that "if there were any complaints against [respondent] or his name was brought up in any type of criminal activity, I would know it." J.A. 54. The court also recounted the *ten* separate letters of recommendation attesting to respondent's "good moral character, integrity, and reputation," which included letters from four police officials, a state district judge, a state district attorney, and a pastor. Pet. App. 36a. The Sheriff, for example, confirmed that his confidence in respondent's suitability to possess firearms rested on his personal knowledge and his personal review of respondent's criminal history records "locally, as well as nationally." J.A. 18. Based on the foregoing, the district court found that "the circumstances regarding the disability imposed by law and [respondent's] record and reputation are such that [respondent] will not be likely to act in a manner dangerous to public safety and that the granting of the relief requested would not be contrary to the public interest." Pet. App. 37a.

5. On the government's appeal, the Fifth Circuit affirmed (Pet. App. 1a-11a), concluding that "[t]he facts of this case illustrate in caps underscored why Congress added the relief provision to the Federal Firearms Act, giving certain convicted felons an avenue to regain the right to possess a firearm" (*id.* 1a).

In addition to the reasons set out in the district court's "detailed Memorandum Opinion" (Pet. App. 3a), the Fifth Circuit found it significant that this Court's precedents not only hold "that the doctrine disfavoring repeals by implication 'applies with ever *greater* force when the claimed repeal rests solely on an Appropriations Act'" (*id.* 7a (quoting *TVA* v. *Hill*, 437 U.S. 153, 190 (1978) (original emphasis in *TVA*)), but also have found appropriations law to impliedly repeal *only* "purely financial right[s] that Congress refused to fund" (*id.* 7a-8a & n.19 (citing *United States* v. *Will*, 449 U.S. 200 (1980) (salaries); *United States* v. *Dickerson*, 310 U.S. 554 (1940) (military reenlistment payments)). This case, by contrast, involves not an

assertion of Congress "merely promising money then changing its mind and not making it available," but rather the claimed suspension of a distinct and established right to judicial review separately conferred by positive law. *Id.* 8a. It would be "inimical to our constitutional system of justice," the Fifth Circuit explained, to find that Congress had abrogated the "rights" set forth in Section 925(c) absent a "direct and definite suspension." *Id.* 8a, 9a. And any suggestion that Congress implicitly intended to repeal those rights is substantially clouded by its decision not to enact a statute that would have done just that. *Id.* 5a-6a & n.9, 8a.

The court of appeals also found it clear that the district court had properly granted respondent relief under Section 925(c). Congress specifically conferred a right to judicial review "to better ensure that relief was available for those felons whose convictions were based on technical or unintentional violations." Pet. App. 4a-5a. This case involves "the almost incredible plight of Thomas Bean who, at most, was negligent in not ensuring that his associates completely performed the simple task directed, and who served months in Mexican and U.S. prisons for a simple oversight." *Id.* 11a. Furthermore, "the record is replete with testimony from legislators, law enforcement officers and BATF agents as to Bean's lawful character." *Id.* 5a-6a n.9. In light of the extensive record, the Fifth Circuit did "not believe that *any reasonable observer*" could be "persuaded that [respondent's] offense creates a likelihood he represents a threat to the public's well-being, and it is beyond peradventure to believe that Congress, or those seeking to rescind § 925(c), intended for someone like Bean to lose his livelihood on the basis of the facts such as are before us. Neither equity nor the law require such an injustice." *Id.* 11a (emphasis added).[6]

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[6] Although the Fifth Circuit properly rejected the government's contentions (raised for the first time on appeal) that respondent was not entitled to relief because he was at the time disabled by Texas law from possessing firearms and because fewer than two years had passed since he was discharged from supervised release (Pet. App. 9a-11a & n.24), it bears noting that neither of those objections has force. State courts have entered a declaration that respondent "is not a convicted felon as that term is defined under Texas law." Order of Feb. 25, 2000, No. D-990, 424-C (Orange Cty., TX, 260th Jud. Dist.); BIO 6. In addition, the two-year period has passed. See Pet. C.A. Br. 16 (acknowledging that the period ended in "August 2001"). See generally BIO 8-13 (highlighting importance to posture of this case that petitioners do not contest respondent's suitability to possess firearms).

6. The full court of appeals denied petitioners' request for rehearing *en banc* without a single judge calling for a vote. Pet. App. 39a-40a.

7. This Court subsequently granted the Solicitor General's petition for certiorari, which identified a circuit conflict over the federal courts' jurisdiction to consider petitions under Section 925(c). 122 S. Ct. 917 (2002).

SUMMARY OF ARGUMENT

I. Petitioners' claim that the right to judicial review which Congress conferred in Section 925(c) has been impliedly repealed through ATF's appropriations must rest on an unambiguous statement by Congress in the statutory text. As the lower courts recognized but petitioners all but ignore, not only will an implied repeal be found only "when the earlier and later statutes are irreconcilable" (*Morton* v. *Mancari*, 417 U.S. 535, 550 (1974)), but that rule "applies with *especial force* when the provision advanced as the repealing measure was enacted in an appropriations bill" (*United States* v. *Will*, 449 U.S. 200, 221-22 (1980) (emphasis in original)). In this case, three further canons of construction heighten that exceedingly stringent standard: the principle that courts must exercise the jurisdiction conferred upon them by Congress; the Rule of Lenity; and the doctrine of constitutional avoidance, which applies with considerable force because petitioners' argument calls the constitutionality of Section 922(g)(1) into question under the Second Amendment. Finally, this is the least likely context in which to find an implied repeal, because Congress closely superintends federal firearms law. Cf. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Of particular note, the House and the Senate have

each considered but declined to adopt *four* proposals to effect the repeal that petitioners urge in this case.

II. Petitioners cannot establish an implied repeal because the lower courts properly harmonized Section 925(c) and ATF's appropriations. The standard articulated below is both eminently practicable and faithful to the statutory text. Only the most extraordinary applicant will survive the rigorous "threshold" inquiry into whether relief is required to avoid a "miscarriage of justice." The applicant then bears the full cost of any investigation necessary to give the district court full confidence that the applicant satisfies all the statutory criteria for relief from firearms disabilities. And relief will ultimately be granted only if the district court finds that "any reasonable observer" would conclude that the applicant is entitled to relief from firearms disabilities. It is undisputed that petitioner satisfies this extremely stringent standard.

III. The three arguments advanced by petitioners manifestly do not constitute the clear and compelling evidence this Court's precedents require to demonstrate a congressional intent to impliedly repeal a statutory right.

A. Petitioners' reliance on the term "denial" to establish an implied repeal is misplaced. This argument, like petitioners' brief generally, proceeds from the false premise that Congress prohibited the Secretary of the Treasury from acting on firearms applications, when in fact the appropriations provisos apply only *to ATF*. The appropriations statutes thus do not purport to prohibit the Secretary from acting on Section 925(c) applications.

In any event, petitioners' position is irreconcilable with the plain meaning of "denial": by refusing to act on respondent's application, the Secretary has "'refus[ed] to grant, assent to, or sanction'" the relief respondent seeks. An array of precedent establishes the commonsense proposition that a refusal to act is, at the least, a constructive "denial" of relief. And petitioners' position cannot be reconciled with either Section 925(c) – which recognizes only two forms of "final action," relief may be "grant[ed]" or "denied" – or the governing regulation.

B. Petitioners' reliance on the legislative history of the appropriations statutes is no more compelling. Petitioners ignore this Court's repeated holding that legislative history is ineffective to establish an implied repeal of a statutory provision. That rule has particular force in this case. There is *no* relevant legislative history for ATF's F.Y. 1999 appropriation. Petitioners also cite only appropriations committee reports, which this Court held in *TVA* v. *Hill*, 437 U.S. 153 (1978), are not representative of the views of the full House or Senate and thus cannot establish an implied repeal. In any event, the legislative history suggests only that Congress made a cost-benefit determination that ATF's large expenditures in reviewing Section 925(c) applications were better spent on another program, in part because ATF was granting relief too freely. The lower courts in this case accommodated both those concerns while giving effect to the right to judicial review expressly conferred by Section 925(c). Petitioners' position furthermore lacks credibility because, at two important points, it relies on legislative history describing measures that Congress did not pass.

C. Petitioners' reliance on the Administrative Procedure Act also fails. The APA does not apply to the distinct right to judicial review that Congress conferred in Section 925(c). To the extent the courts have inferred the APA's applicability, it is that inference, not the right to judicial review, that gives way to any conflict with ATF's appropriations. In any event, respondent is entitled to relief under the APA. The Secretary's refusal to grant respondent the relief from firearms disabilities to which he is entitled under the standards set by Section 925(c) is "unlawful," "short of statutory right," and "unwarranted by the facts." 5 U.S.C. 706. Furthermore, both the statutory text and precedent establish that the district court was not required to remand respondent's application to the Secretary (relief that petitioners did not seek in any event).

The judgment of the court of appeals accordingly should be affirmed.

ARGUMENT

I. Petitioners' Claim That Section 925(c) Has Been Impliedly Repealed Can Only Be Sustained Based on an Unambiguous Statement by Congress in the Statutory Text.

1. Petitioners contend that Congress deprived the federal courts of jurisdiction over this case by impliedly repealing 18 U.S.C. 925(c) as it applies to individuals. The statute provides that any "person" – defined to include "any individual" (18 U.S.C. 921(a)(1)) – may apply for relief from firearms disabilities. *Id.* § 925(c). Congress authorized the Secretary, in turn, to "grant such relief" so long as certain criteria are met. *Id.* And individuals may subsequently secure "judicial review" wherein the court may "admit additional evidence where failure to do so would result in a miscarriage of justice." *Id.* Congress has not repealed these provisions. Nor has the Secretary repealed or otherwise amended the governing regulation (27 C.F.R. 178.144) to reflect what petitioners now contend has been Congress's unambiguous intent for the past decade. The court of appeals accordingly held that these unambiguous statements of positive law must be given force and effect. See Pet. App. 8a-9a; *supra* at 11-12.

Petitioners rest their contrary position not on any provision of federal firearms law, nor on any other statutory restriction on the authority of the Secretary or the jurisdiction of the federal courts, but rather on the federal appropriations statutes governing ATF's expenditures of funds. Since F.Y. 1993, Congress has annually appended the following "proviso" to ATF's budget: "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities." Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732, Unnumbered Section: "Bureau of Alcohol, Tobacco and Firearms – Salaries and Expenses." See *infra* at 1a-2a (collecting appropriations statutes). According to petitioners, the "appropriations bar has the effect of suspending the Secretary's authority under Section 925(c)" (Pet. Br. 11) and

furthermore "effectively precludes a court from awarding a convicted felon relief" (*id.* 17 (title)).

2. Petitioners only glancingly acknowledge the exceedingly high bar their "implied repeal" claim must overcome. Our Constitution's system of separated and divided powers requires the courts to interpret and the Executive to enforce the statutes Congress writes and duly enacts into law. See U.S. Const. art. I, § 2; *id.* art. II, § 3; *id.* art. III, § 2. Given the singular importance of positive law in our constitutional system, this Court has found a "repeal by implication" of a statute on the books only in the face of "overwhelming evidence." *J.E.M. AG Supply* v. *Pioneer Hi-Bred Int'l*, 122 S. Ct. 593, 601 (2001). One statute repeals another by implication only "when the earlier and later statutes are *irreconcilable*." *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974) (emphasis added). Few rules of statutory construction have such a settled provenance in this Court's jurisprudence. "It would be dangerous in the extreme to infer * * * that a case for which the words of an instrument expressly provide, shall be exempted from its operation." *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819). Adherence to these basic principles is absolutely essential when, as in this case, the Executive seeks to abrogate the jurisdiction that Congress has conferred on the courts in order to avoid enforcing a statute that it disfavors.

The already stringent standard for finding an implied repeal "applies with *especial force* when the provision advanced as the repealing measure was enacted in an appropriations bill." *United States* v. *Will*, 449 U.S. 200, 221-22 (1980) (emphasis in original) (citing *TVA* v. *Hill*, 437 U.S. 153, 190 (1978)). This ratcheting up of the bar respects not merely the roles assigned to the respective branches of government by the Constitution, but also Congress's own procedures and ordinary practice. Unlike single-purpose statutes that unambiguously repeal ongoing statutory rights, appropriations are revisited every year and are the amalgamated product of thousands of necessarily zero-sum compromises reached in the sausage factory that is federal budgeting. For their part, legislators and even the President, who has the vital prerogative to sign or veto legislation, must be able to act on the understanding that appropriations measures will, in

fact, address *appropriations*, not fundamentally alter the operation of separate statutory schemes. Indeed, the House and Senate Appropriations Committees lack jurisdiction to consider and determine matters of substantive law. See *TVA*, 437 U.S. at 191. The rules of both chambers, in turn, affirmatively forbid the use of budget measures to change law not related to appropriations. *E.g.*, House R. 21(2)(b) ("A provision changing existing law may not be reported in a general appropriation bill * * * except rescissions of appropriations contained in appropriation Acts."); see also Senate R. 16(2); *Will*, 449 U.S. at 222. This Court's decisions consistently respect this limitation, finding an implied repeal by appropriations law *only* in the context of salary increases and other similar "purely financial right[s] that Congress refused to fund." Pet. App. 7a-8a & n.19 (collecting cases).[7]

Petitioners ask this Court to find an implied repeal by appropriations law in circumstances never contemplated, much less approved, by this Court's precedents. To be sure, "Congress has *authority* under the Constitution to suspend or repeal substantive law through the enactment of an appropriations law." Pet. Br. 11 (emphasis added). But as a matter of *statutory construction*, this Court has never suggested that Congress's decision to reallocate the funding for a federal program – here, ATF's administrative relief program – could be interpreted to repeal a distinct statutory right. To the contrary, a strong negative inference arises as a result: an implied repeal will not be found when

[7] Thus, *United States* v. *Will*, *supra*, and each of the cases it cited (449 U.S. at 222 & n.23) – *United States* v. *Dickerson*, 310 U.S. 554 (1940), *Belknap* v. *United States*, 150 U.S. 588, 594 (1893), and *United States* v. *Mitchell*, 109 U.S. 146, 150 (1883) – involved Congress's use of an appropriations statute to repeal a previously enacted right to compensation. Petitioners' contrary reliance on *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992), is misplaced. Although *Robertson* held that "a provision in an appropriations law effectively amended a federal environmental statute" (Pet. Br. 24), the appropriations statute in that case did so *expressly*, not impliedly. See 503 U.S. at 440 (Because the appropriations statute "provided *by its terms* that compliance with certain new law constituted compliance with certain old law, the intent to modify was not only clear, but express.").

Congress "nowhere addresses" the supposedly repealed provision. *Regional Rail Reorg'n Act Cases*, 419 U.S. 102, 129 (1974). Rather, "the general rule that repeals by implication are disfavored is *especially* strong" when Congress has acted to repeal one provision but not another because, "if Congress had meant to repeal any part of any other previous statute, it could easily have done so." *Hagen* v. *Utah*, 510 U.S. 399, 416 (1994) (emphasis added). Accord *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018-19 (1984) (Congress's failure to address in FIFRA Claims Court's jurisdiction over Fifth Amendment takings claims under Tucker Act may have reflected view that no taking occurred or that jurisdiction was available; such ambiguity "cannot be construed to reflect an unambiguous intention to withdraw" jurisdiction). Congress is perfectly capable of fully suspending a particular program through appropriations measures.[8] Accepting petitioners' position could cause unforeseeable damage to the operation of numerous statutory schemes, for Congress often renders specific programs inoperative by withholding funding. A decision by this Court that such restrictions simultaneously operate to repeal distinct but related substantive rights would open the doors to numerous findings, contrary to Congress's intent, that provisions of positive law have been repealed or suspended.

3. If it were possible to imagine a more stringent standard than that already required to find an implied repeal by appropriations law, it would apply in this case, for petitioners' position is substantially disfavored under *three* further settled canons of

[8] Indeed, the provisos to ATF's appropriations are conspicuously narrower than those Congress uses in other instances. Compare, *e.g.*, Act of Nov. 28, 2001, Pub. L. No. 107-76, § 721, 115 Stat. 704 ("[N]one of the funds appropriated or otherwise made available by this or any other Act may be used to pay the salaries and expenses of personnel to carry out section 793 of Public Law 104-127."); Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, § 1107, 115 Stat. 2230 ("[N]one of the funds in this Act, or any other Appropriations Act for fiscal year 2002, shall be available for the position of Under Secretary of Transportation for Policy or the position of Assistant Secretary for Public Affairs.").

construction. *First*, Section 925(c) on its face grants individuals a right of "judicial review," and the "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress" (*Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (collecting cases)). See *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("[Federal courts] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the [C]onstitution."); cf. *Examining Bd. of Eng'rs* v. *de Otero*, 426 U.S. 572, 594-95 (1976) (rejecting claim that compact granting Puerto Rico commonwealth status impliedly repealed jurisdiction of Federal District Court of Puerto Rico to enforce 42 U.S.C. 1983 "[i]n the absence of a change in the language of the jurisdictional provision or of affirmative evidence in the legislative history"). A holding that this font of jurisdiction was impliedly repealed on less than the strongest possible showing would be "inimical to our constitutional system of justice." Pet. App. 8a.

Second, the right to judicial review granted by Section 925(c) is integral to the scope of the criminal sanction of Section 922(g)(1). Section 925(c) provides an express "[e]xception[]" (18 U.S.C. 925 (title)) that serves the important purpose of "alleviat[ing]" the "potential harshness" of Section 922(g)'s otherwise broad prohibition (*Dickerson* v. *New Banner Inst.*, 460 U.S. 103, 120 (1983)). The relief provided by Section 925(c) is particularly critical because a defendant may not collaterally attack the constitutionality of his felony conviction in defending a charge of unlawful firearms possession, a conclusion this Court reached only after determining that "a convicted felon is not without relief" in light of the orderly scheme established by Section 925(c), under which an applicant would "clear his status *before* obtaining a firearm." *Lewis* v. *United States*, 445 U.S. 55, 64 (1980) (emphasis in original). Under the Rule of Lenity, "doubts are resolved in favor of the defendant" at least when "Congress has not 'plainly and unmistakably'" dictated a contrary result. *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (narrowly construing prohibition as it applies to possession of

firearms "in commerce or affecting commerce") (quoting *United States* v. *Gradwell*, 243 U.S. 476, 485 (1917)).

Third, statutes should be "construed so as to avoid difficult constitutional questions" (*Vt. Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 787 (2000)), such that this Court will "not lightly assume that Congress intended to infringe constitutionally protected liberties" (*Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Coun.*, 485 U.S. 568, 575 (1988) (collecting cases)). This principle has particular force in the context of claimed repeals of jurisdictional provisions by appropriations law. Thus, in the *Regional Rail Reorganization Act Cases*, 419 U.S. at 134, the Court explained that its conclusion that a railroad reorganization statute did not impliedly repeal the jurisdiction of the Claims Court to adjudicate asserted violations of the Takings Clause under the Tucker Act was animated by the principle that "when a statute is ambiguous, 'construction should go in the direction of constitutional policy'" (quoting *United States* v. *Johnson*, 323 U.S. 273, 276 (1944)). More recently, in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), the Court held that a 1996 immigration statute did not partially repeal the jurisdiction conferred by the federal habeas statutes. The Court reasoned that such an argument would have to overcome the presumption against implied repeals (*id.* at 299 n.11), as well as "the strong presumption in favor of judicial review of administrative action" (*id.* at 298 & n.9 (collecting cases)), and furthermore would raise a substantial question under the Constitution's Suspension Clause (*id.* at 300 n.13). "The necessity of resolving such a serious and difficult constitutional issue – and the desirability of avoiding that necessity – simply reinforce the reasons for requiring a clear and unambiguous statement of constitutional intent." *Id.* at 305. And in *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981), the Court rejected the argument that the Unemployment Compensation Amendments of 1976 impliedly repealed the statutory exemption for church-related schools from unemployment taxes. The Court explained that the "long-established canon of construction" disfavoring implied repeals "carries *special weight* when an implied repeal or amendment might raise constitutional

questions." *Id.* at 788 (citing *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979)) (emphasis added).

Petitioners' reading of federal firearms law violates this important canon of construction because they ask this Court to presume that Congress intended to raise a substantial question regarding the constitutionality of Section 922(g)(1) under the Second Amendment to the Constitution. See generally *United States* v. *Emerson*, 270 F.3d 203, 261 (CA5 2001) ("[T]he Second Amendment *does* protect individual rights," and those rights may be limited only subject to "narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country."), *cert. denied*, 2002 U.S. LEXIS 4269 (June 10, 2002); Br. for the U.S., No. 01-8780, *Emerson* v. *United States* 19-20 n.3. On petitioners' view, the categorical criminal sanction of Section 922(g)(1) offers absolutely no opportunity for either the executive branch or the courts to assess whether there is any reasonable basis for depriving any particular individual of the right to keep and bear arms.

4. There is yet another reason why this Court should be dubious of petitioners' position. This case, more than any other in which the Court has been asked to find an implied repeal, involves a statutory scheme carefully superintended by Congress. Cf. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Section 925(c) is an integral component of "a carefully constructed package of gun control legislation. * * * 'Congress knew the significance and meaning of the language it employed.'" *New Banner Inst.*, 460 U.S. at 120 (alteration in original) (quoting *Scarborough* v. *United States*, 431 U.S. 563, 570 (1977) (quoting, in turn, *Barrett* v. *United States*, 423 U.S. 212, 217 (1976))). Given the committed interests on all sides, it is a simple fact in this country that substantial changes to firearms laws are not made either obliquely or lightly. Accordingly, claims in this forum that such important statutory provisions have been altered by indirection very likely represent attempts to secure victories in court that could not be won in the legislative body.

Since 1990, Congress has amended Section 925 three times while failing to adopt numerous other proposals.[9] Particularly relevant to the question presented by this case, the Senate and House have *each* considered but not adopted *four* separate measures that would have eliminated the administrative and judicial remedies provided by Section 925(c). See *infra* at 8a-14a (reproducing S. 2338, 106th Cong., 2d Sess. § 301(a)(1) (2000); H.R. 4066, 106th Cong., 2d Sess. § 301(a)(1) (2000); H.R. 2281, 106th Cong., 1st Sess. § 2(a)(1) (1999); H.R. 1228, 105th Cong., 1st Sess. § 2(a)(1) (1997); S. 1068, 104th Cong., 1st Sess. § 2(a)(1) (1995); H.R. 2101, 104th Cong., 1st Sess. § 2(a)(1) (1995); S. 1400, 103d Cong., 1st Sess. § 3(a) (1993); S. 2304, 102d Cong., 2d Sess. § 3(a) (1992)). For example, several proposals would have permitted only corporations, not individuals, to file applications and to seek judicial review. *E.g.*, S. 2338, *supra*. Other proposals would have gone further and eliminated the judicial review provision altogether. *E.g.*, S. 1400, *supra*. Petitioners now ask this Court to impose judicially precisely the statutory changes that Congress declined to adopt. In these circumstances, it would be inappropriate to enact a legislative scheme that "Congress considered and rejected." *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 220 (1983); see also *FDA*, 529 U.S. at 144.

Petitioners (at 26) recite the objection that Congress may fail to enact legislation for any number of reasons, such that it is unclear why Congress did not enact these statutes. But even if that

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[9] Congress adopted Act of Sept. 30, 1996, Pub. L. No. 104-208, § 658(c), 110 Stat. 3009, 3009-372; Act of Oct. 11, 1996, Pub. L. No. 104-294, § 607(c), 110 Stat. 3488, 3511; and Act of Feb. 10, 1996, Pub. L. No. 104-106, § 1624(b)(3), 110 Stat. 186. Congress declined to adopt H.R. 4193, 107th Cong., 2d Sess. § 7 (2002); S. 2310, 106th Cong., 2d Sess. § 3 (2000); S. 995, 106th Cong., 1st Sess. § 311 (1999); H.R. 1501, 106th Cong., 1st Sess. § 608 (1999); H.R. 2037, 106th Cong., 1st Sess. § 508 (1999); H.R. 3954, 105th Cong., 2d Sess. § 3 (1998); S. 723, 105th Cong., 1st Sess. § 4 (1997); H.R. 3455, 104th Cong., 2d Sess. § 5 (1996); S. 1632, 104th Cong., 2d Sess. § 5 (1996); H.R. 3746, 103d Cong., 2d Sess. § 102 (1994); and H.R. 4763, 103d Cong., 2d Sess. § 2 (1994).

argument were given its full force in this context, it would only reinforce respondent's position: such uncertainty precludes any finding that Congress impliedly repealed Section 925(c) through appropriations legislation. That is so because, as noted (see *supra* at 17-19), such an implied repeal must rest on an unambiguous statement of congressional intent.

The inferences properly drawn from these failed proposals to repeal Section 925(c), moreover, are unusually strong. The legislation was opposed based on "the bill's stripping of the right of the applicant denied relief by the Secretary to petition the district court for review of the denial." *Stop Arming Felons Act: Hearing Before the Subcomm. on the Const. of the Comm. on the Judiciary*, 102d Cong., 2d Sess. 8 (1992) (Sen. Hatch). At the very lea , the failed proposals establish that Congress knew that the federal courts regarded the provisos to ATF's budget as ambiguous on the question whether they repealed applicants' right to judicial review, yet failed to adopt the "clear" statement that this Court's precedents require to repeal that right. That is so because in 1997, the legislation's proponents unsuccessfully sought to overrule the Third Circuit's holding in *Rice* v. *United States*, 68 F.3d 702 (1995), that judicial review remains available under Section 925(c). H.R. 1228, *supra*; 143 Cong. Rec. H1292 (daily ed. Apr. 8, 1997) (Rep. Morella). Also of note, the attempt to amend the 1996 House appropriations bill (see Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-319) to eliminate the right to judicial review was barred by the Chairman of the House as violative of the provision of House Rule 21 that "[n]o amendment to a general appropriation bill shall be in order if changing existing law." 142 Cong. Rec. H7678-79 (daily ed. July 17, 1996). This exchange is cited in the House Rules Manual as an example of an impermissible attempt to add substantive legislation to an appropriations bill. H.R. Doc. No. 106-320, at 819-20 (2001). This Court, of course, relied on *precisely* that Rule in adopting an exceedingly stringent standard for establishing implied repeals by appropriations law. *Will*, 449 U.S. at 221-22; see *supra* at 18.[10]

* * * *

In light of the foregoing, there manifestly is no reason to stretch either settled canons of construction or the statutory text in order to find Section 925(c) to be repealed. This Court has only found an implied repeal by appropriations law three times in the past century. *Robertson* v. *Seattle Audobon Soc'y*, 503 U.S. 429 (1992); *Will, supra*; *United States* v. *Dickerson*, 310 U.S. 554 (1940). In enacting appropriations statutes, Congress acts against the firmly settled understanding that such measures will repeal substantive law in only the most exceptional circumstances and only upon unequivocal declarations of congressional intent, neither of which is present here. If Congress actually intends to eliminate the availability of judicial review under Section 925(c), it can easily do so in a single sentence in a single bill – more easily, in fact, than by legislating annually as it has done in the past. And if Congress intends to produce that result and prefers to do so through appropriations legislation, it can and should include such a provision in the Treasury Department's next appropriations measure. On the other hand, refusing to give effect to Section 925(c) will open the door to numerous other claims of implied repeals when the Executive Branch or private litigants prefer not to comply with a statute on the books. There is no real doubt that the branches of government will operate better, and Congress's intent will be more faithfully implemented, through adherence to the statutory text.

Petitioners' claim that provisos to ATF's budget have impliedly repealed Section 925(c) thus can be sustained, if at all, based only on the most definitive proof of Congress's intent. A

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[10] Thus, although petitioners cite a single legislator's statement as supposedly suggesting an intent to impliedly repeal individuals' right to judicial review (Pet. Br. 23 (quoting 142 Cong. Rec. 27,066 (1996) (Sen. Simon)) they fail to acknowledge that this statement was actually made in support of the proposed 1996 appropriations amendment *that failed*. See 142 Cong. Rec. S10,139 (daily ed. Sept. 10, 1996) (reporting 1996 appropriations act with failed amendment in Senate).

clear statement by Congress in the statutory text is the only way to "assure[] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 109 (1991) (quoting *Bass*, 404 U.S. at 349). But as respondent shows in the following sections, petitioners have failed to identify anything resembling such a clear statement. The lower courts in this case therefore properly construed Section 925(c) and the appropriations statutes in order to give effect to each.

II. The Lower Courts Properly Harmonized Section 925(c) and the Appropriations Statutes Governing ATF.

In holding that jurisdiction existed in this case and that respondent was entitled to relief from firearms disabilities, the lower courts accommodated not only the unambiguous command of all the relevant statutory enactments but also the "concerns expressed by Congress" in ATF's annual appropriations measures. Pet. App. 28a. This case thus demonstrates that giving effect to the right to judicial review expressly conferred by Section 925(c) is not only faithful to Congress's intent but also entirely practicable. Petitioners' contrary arguments attack only a distorted caricature of the lower courts' decisions.

Congress has provided that a "person," including any "individual," who is subject to firearms disabilities "may make application to the Secretary for relief." 18 U.S.C. 925(c), 921(a)(1). The regulation implementing Section 925(c) provides, in turn, that the applicant must establish an evidentiary foundation for the request by attaching various "supporting data." 27 C.F.R. 178.144(b). This includes, at a minimum, "a written statement from each of 3 references, who are not related to the applicant by blood or marriage and have known the applicant for at least 3 years, recommending the granting of relief." *Id.* § 178.144(c)(1). In this case, respondent's application sets forth detailed information regarding his personal history and the circumstances of his conviction, and also appended five letters of recommendation from law enforcement officers and a state judge. J.A. 27-32.

No provision of law precludes the Secretary from exercising his statutory authority and duty to personally grant relief under Section 925(c). The Treasury Department's own policy, however, is to refer all such applications to ATF. Although ATF does not "investigate" or otherwise "act" on the application (*e.g.*, Pub. L. No. 105-277, 112 Stat. 2681-485), it is not required to ignore the application or hold it in abeyance. ATF's practice instead has been to return applications with an express statement that no action would be taken. This refusal to act "constitutes a de facto denial" of the application – for it would at that point be "wholly futile or inadequate" for the applicant to continue to pursue administrative action – giving rise to a right to "judicial review." Pet. App. 30a; see also *infra* Part II-B. In this case, when ATF advised respondent that it would not take any action on his application (J.A. 33-34), he properly filed a petition in federal district court (*id.* 8-15).

In court, the applicant may seek to present "additional evidence" beyond that already included with the administrative application. 18 U.S.C. 925(c); see also THE NEW OXFORD AM. DICT. 18 (2001) (defining additional as "added, extra, or supplementary to what is already present or available").[11] The court, however, may only "consider" that evidence "where failure to do so would result in a miscarriage of justice." 18 U.S.C. 925(c). The statute thus establishes a rigorous "threshold" standard that the application must satisfy to receive *any* consideration. *Palma* v. *United States*, 228 F.3d 323, 329 (CA3 2000).

If this preliminary bar is overcome, the applicant is required to pay the full cost of any "investigative work [that] needs to be done," a requirement that accommodates Congress's concern in the appropriations measures that ATF was expending millions of dollars to investigate applications. Pet. App. 28a, 29a. In deciding whether the evidence is sufficient to proceed past the

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[11] As the dictionary definition of "additional" makes clear, the court could admit further evidence even if none were compiled at the administrative stage. Contra Pet. Br. 19-20. On petitioners' contrary view, the Secretary could strip federal courts of jurisdiction by the expedient of refusing to compile an administrative record.

"threshold" stage and consider the petition's merits, the court has the benefit of the statutory and regulatory criteria for granting relief, as well as information on "how the ATF had conducted its investigations in the past." *Id.* 29a; 18 U.S.C. 925(c); 27 C.F.R. 178.144(d). At all stages, the "burden [is] on the applicant" to present sufficient evidence regarding matters such as his "record, reputation, and the underlying reason for the disability." Pet. App. 28a. Not only will the government have the opportunity to contest the applicant's proof but, as explained in the legislative history quoted by petitioners (at 20-21), the court can "request the presence of an agent representing the Secretary, and stay the action for a suitable time to permit the Secretary to review his finding in light of the additional evidence. It would then proceed if that evidence did not alter the Secretary's determination" (S. Rep. No. 583, 98th Cong., 2d Sess. 27 (1984)). If the district court, after consulting with the government, concludes that the evidentiary record still contains gaps precluding a confident determination that firearms rights should be restored, and thus that the applicant failed "to secure all the necessary evidence," the court will simply deny relief. Pet. App. 28a.

District judges are ideally suited to determining whether firearms rights should be restored. Congress recognized as much in authorizing judicial review in the first instance. And, "part of the day-to-day role of the court is to make character determinations of the individuals before it" and to resolve other "adjudicative" disputes indistinguishable from those raised under Section 925(c). Pet. App. 28a-29a. Cf. *Hilton* v. *Braunskill*, 481 U.S. 770, 777 (1987) (in determining whether to release successful habeas petitioner pending final resolution of case, district court considers, *inter alia*, "risk that the prisoner will pose a danger to the public"); *United States* v. *Salerno*, 481 U.S. 739, 751 (1987) (upholding constitutionality of Bail Reform Act of 1984, pursuant to which district court evaluates, *inter alia*, likelihood of future dangerousness). Moreover, the fact that federal law restores firearms rights under Section 921(a)(20) whenever provided by state law demonstrates beyond peradventure that Congress does not regard ATF as "solely and specially capable" of making such a determination. Pet. App. 25a. In-

deed, fourteen states restore firearms rights automatically upon completion of the defendant's sentence. Five more do so through application to a judge. See *infra* at 15a.

Even so, the Fifth Circuit insisted that district courts exercise the jurisdiction conferred by Section 925(c) sparingly. In the rare cases in which the district court determines at the threshold that the failure to grant relief would constitute a miscarriage of justice but the Secretary continues to oppose the application notwithstanding the additional evidence compiled by the applicant, the court may grant relief only when it finds that "any reasonable observer" would conclude that the statutory standard has been satisfied. Pet. App. 11a. A particularly important criterion is whether the disability arises from a "technical or unintentional" offense, for the statute specifically reflects Congress's determination that it was "essential" to adopt a "safety valve" "[m]aking relief available" to persons "convicted of technical or unintentional violations." *Id.* 4a-5a; S. Rep. No. 583, *supra*, at 26. This rigorous test is faithful to the statutory text (which grants the Secretary discretion but unambiguously subjects that discretion to "judicial review" (18 U.S.C. 925(c))), effectuates Congress's desire in the appropriations measures to curtail the large proportion of cases in which ATF had granted relief (see *supra* at 5), and avoids "empower[ing] district courts to assume the agency's role." (Pet. Br. 8). It also is reflective of the great restraint in applying Section 925(c) that has uniformly been shown by the federal courts, which ultimately have granted relief from firearms disabilities in only a *handful* of cases since 1965. Pet. App. 12a-38a (this case); *Rice* v. *United States*, No. 93-6107, 1997 U.S. Dist. LEXIS 1126 (E.D. Pa. Jan. 31, 1997); *In re Petition of Porrazzo*, 771 F. Supp. 304 (D. Nev. 1991).[12]

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[12] The experience in the Third Circuit is particularly instructive. After that court held in 1995 in *Rice*, 68 F.3d at 710, that the right to judicial review had not been repealed, district courts in the Third Circuit were very rarely presented with Section 925(c) petitions. *Rice* v. *United States*, No. 93-6107, 1997 U.S. Dist. LEXIS 1126 (E.D. Pa. Jan. 31, 1997); *Pontarelli* v. *United States Dep't of the Treasury*, No. 98-5081, 2000 U.S. Dist. LEXIS 2702 (E.D. Pa. Mar. 10, 2000), *rev'd*,

It is undisputed that respondent satisfies the stringent requirements for securing judicial relief under Section 925(c) established by the lower courts. "The facts of this case illustrate in caps underscored why Congress added the relief provision to the Federal Firearms Act." Pet. App. 1a. Respondent was "at most * * * negligent" in not absolutely ensuring that all ammunition had been removed from his vehicle before arriving at the Mexican border (*id.* 11a), for there is no dispute that he instructed an assistant to do so (*id.* 13a). Furthermore, Section 925(c) is the only mechanism to avoid a basic "miscarriage of justice" in this case, given that respondent's inability to possess firearms caused him to "lose his livelihood" (*id.* 11a), and that he was convicted without a trial and through the use of a "confession" he was required to sign in a language he did not understand (*id.* 32a). The district court further found as a matter of fact – based on, *inter alia*, the extensive submissions of numerous law enforcement officers having personal knowledge of respondent and his professional dealings as a firearms licensee – that respondent is an individual of absolutely unimpeachable character who presents no danger to the public and is properly trusted to possess a firearm. See *supra* at 10-11. Indeed, "the record is replete with testimony from legislators, law enforcement officers and BATF agents as to [respondent's] lawful character." Pet. App. 5a-6a n.9. Respondent was ready to produce additional evidence to meet any argument by petitioners that this proof was lacking in any way, but they made no such claim. And the district judge was ideally suited to make these factual determinations regarding respondent's character, having previously overseen his supervised release with the benefit of the reports and investigation of the U.S. Probation Office.

III. Congress Has Not Impliedly Repealed 18 U.S.C. 925(c).

As respondent showed in Part I, *supra*, petitioners' claim that the judicial review provision of Section 925(c) has been re-

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285 F.3d 216 (3d Cir. 2002); *Palma* v. *United States*, 48 F. Supp. 2d 481 (E.D. Pa. 1999), *rev'd*, 228 F.3d 323 (3d Cir. 2000). See generally BIO 16; U.S. BIO, No. 95-2015, *McGill* v. *United States* 11.

pealed must overcome not only the special disfavor accorded repeals by implication in appropriations statutes, but also the strong presumption that federal courts will exercise jurisdiction conferred upon them by Congress, the Rule of Lenity, and the doctrine of constitutional avoidance. But petitioners' attempt to make the required showing of an unambiguous congressional intent to effect an implied repeal faces two insuperable obstacles: Congress easily could have expressed that intent; and Congress declined to adopt several proposals that would have done just that. In the face of these gaping flaws in their theory, petitioners seek to cobble together other, indirect indicia of a congressional intent – that applications for relief from firearms disabilities are not "denied"; that the legislative history demonstrates an intent to repeal Section 925(c); and that judicial review of firearms applications conflicts with the Administrative Procedure Act. Not only is each of these arguments wrong both factually and legally, but none would in any event constitute the clear and unambiguous expression of congressional intent required to establish an implied repeal by appropriations law under this Court's precedents.

A. Applications for Relief from Firearms Disabilities Are "Denied" Under the Appropriations Acts.

Petitioners' principal contention is that Congress has repealed the administrative relief provisions of Section 925(c) and, as such, has removed an essential predicate to judicial review. They couch this claim in terms of the supposed inability of the Secretary to "deny" applications for relief under the appropriations statutes.

1. Petitioners' argument fails at the outset because it is self-defeating even if true. They identify a supposed conflict between the appropriations statutes and the provision of Section 925(c) conditioning the right to judicial review on the "denial" of an application. But under the principle that statutes must be rationalized to the extent possible, any implied repeal is limited "to the extent of the conflict." *Posadas* v. *Nat'l City Bank*, 296 U.S. 497, 503 (1936). The consequence of petitioners' argument would therefore be to hold that the requirement of a "*denial*" has been impliedly repealed – not, as petitioners suppose, to abro-

gate the right to judicial review. "If Congress 'intended' to change anything, it deleted administrative action from the statute, but otherwise left judicial relief available." Pet. App. 24a. That conclusion is buttressed by the total absence of any indication in the text or legislative history of any intent by Congress to repeal the right to judicial review. On this view, applicants would be entitled to proceed to court once they compiled and submitted to the Secretary the application and supporting evidence required by the governing regulation. See *supra* at 7.

In any event, petitioners' premise that Congress has repealed "*the Secretary's* authority under Section 925(c) to grant to convicted felons relief from their firearms disabilities" (Pet. Br. 11 (emphasis added)) is just wrong. Petitioners – like each of the courts that embrace the construction which petitioners propose – totally ignore that the appropriations "provisos" apply only *to ATF*, a discrete component of the Department of the Treasury. Compare Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732, Unnumbered Section: "Bureau of Alcohol, Tobacco and Firearms – Salaries and Expenses," with *id.* §§ 101-108 (appropriations measures governing "Department of the Treasury – General Provisions").[13]

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[13] That the appropriations bar applies only to ATF and not to the Department of the Treasury as a whole is confirmed by the language of the proviso: "none of the funds appropriated *herein* shall be available * * *" (emphasis added). The term "herein" is used in appropriations acts to refer to the subsection in which the term appears, not to the entire Act. Thus, for example, the same appropriations act in which the ATF proviso appears contains, in the section labeled "Bureau of the Public Debt," a proviso allocating $191,353,000 for "expenses connected with any public-debt issues" and providing that "the sum appropriated *herein* from the General Fund for fiscal year 2002 shall be reduced by not more than $4,400,000 * * * so as to result in a final fiscal year 2002 appropriation from the General Fund estimated at $186,953,000." Treasury and General Government Appropriations Act, 2002, Pub. L. No. 107-67, 115 Stat. 514 (emphasis added). Plainly, the "sum appropriated herein" must be the $191,353,000 allocated in the *subsection*, because $191,353,000 minus $4,400,000 equals $186,953,000.

That is *not* to say that the Secretary could circumvent the appropriations statutes by "transfer[ring] the functions, missions, or activities of the Bureau of Alcohol, Tobacco and Firearms" with respect to Section 925(c) applications "to other agencies or Departments" (Pub. L. No. 107-67, 115 Stat. 514); he may not. Rather, by "grant[ing] relief" of his own accord the Secretary would be exercising his own power under Section 925(c) and not reallocating a function of ATF to himself. Although the Secretary has elected to delegate to ATF his responsibility for administering the firearms laws, that administrative delegation does not obviate "the dignity of the discretionary act which is confided solely to the agency head[]" (*Lewis* v. *NLRB*, 357 U.S. 10, 15 (1958)). The Secretary thus could not abdicate his statutory authority if he wanted to. And the delegation order not surprisingly disclaims any such intent: the Secretary granted the Director of the ATF authority to administer "18 U.S.C. Chapter 44 (relating to firearms)," which includes Section 925(c), but provided that this authority is subject to the "direction of the Secretary of the Treasury [and] the supervision of the Assistant Secretary." Treas. Dep't Order No. 221, §§ 1, 2(d), *Establishment of the Bureau of Alcohol, Tobacco and Firearms*, 1972-1 C.B. 777, *reproduced infra* at 16a. Accord Br. for the U.S., No. 84-1904, *United States Dep't of the Treasury* v. *Galioto* 2 (Section 925(c) "empowers the Secretary of the Treasury (and through him his delegate, the Director of the Bureau of Alcohol, Tobacco and Firearms (BATF)) to lift the disabilities imposed" by federal law); J.A. 33 (ATF denial letter acknowledging that Section 925(c) "provides the Secretary of the Treasury with the authority to grant relief from this disability"). Thus, nothing in the appropriations measure purports to preclude – much less unambiguously forbid – the Secretary from exercising the power conferred by Section 925(c) to grant relief to a deserving applicant in an appropriately exceptional case such as this one. Congress easily could have put a restriction in the Treasury Department's general budget to forbid the Secretary from acting on

applications, but it has never done so. Indeed, petitioners' position reduces to the absurd proposition that if the Secretary had *ever* personally exercised the power unambiguously conferred by Section 925(c) to grant an application under Section 925(c), that action would have been *ultra vires* and unlawful.[14]

2. In any event, petitioners' position cannot be sustained by narrowly reading "denial" to encompass only an affirmative order by the Secretary or ATF rejecting an application "on the merits." That construction would read the express right to judicial review out of Section 925(c) by reading into the appropriations statute a provision that Congress could have adopted but did not. And even if petitioners' reading were one plausible interpretation of the statute, it manifestly would not be the only one. Petitioners hope to create an inconsistency between the appropriations measures and Section 925(c) that, in effect, causes the latter provision to self-destruct. But it is settled that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). "[W]henever possible, statutes should be read consistently." *Kremer* v. *Chem. Constr. Corp.*, 456 U.S. 461, 468 (1982).

Indeed, petitioners' interpretation of "denial" must overcome the *further* "strong presumption that Congress intends judicial review" of agency action. *Bowen* v. *Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). That presumption applies

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[14] Nor can petitioners recharacterize the appropriations acts as simply eliminating the "predicate" for judicial review, as opposed to impliedly repealing the statutory right to judicial review. "Both types of 'repeal' – effective and actual – involve the compromise or abandonment of previously articulated policies, and we would normally expect some expression by Congress that such results are intended. Indeed, the expectation that there would be some expression of an intent to 'repeal' is particularly strong in a case like this one, in which the 'repeal' would extend to virtually every case to which the statute had application." *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 169 (1976).

with particular force when, as here, the Court is asked to find "a total preclusion of [judicial] review." *Shalala* v. *Ill. Coun. on Long Term Care*, 529 U.S. 1, 19 (2000). But petitioners fail to offer anything like the "'clear and convincing evidence' of a contrary legislative intent" (*Abbott Labs.* v. *Gardner*, 387 U.S. 136, 141 (1967)) required to sustain their position. Of note, *nothing* in the statutory text or legislative history of the ATF appropriations statutes or Section 925(c) contains the slightest suggestion that Congress intended to preclude individuals from securing judicial review of the Secretary's refusal to act. Instead, the statute evinces the common intention to require applicants to exhaust their administrative remedies (see Pet. App. 29a-30a), which petitioners concede (at 26) has occurred in this case.

An interpretation that reconciles the appropriations statutes with Section 925(c) is not only plausible, but in fact represents by far the better reading. Petitioners are no doubt correct that, prior to the appropriations statutes, judicial review under Section 925(c) was generally triggered by ATF's "denial" of the application "on the merits." But the statute is not conditioned on the Secretary's "denial" taking that form and that prior practice simply is not relevant to the question whether the appropriations statutes and Section 925(c) now stand in "irreconcilable conflict." They do not. In refusing to act, ATF has "denied" respondent's application because it manifestly has "'refus[ed] to grant, assent to, or sanction'" the relief he seeks. Pet. Br. 18 (quoting definition of "denial" in WEBSTER'S THIRD NEW INT'L DICT. 602 (3d ed. 1993)). ATF does not hold applications in limbo but rather affirmatively rejects them, stating that it will not act. See J.A. 33-34. That refusal to grant relief constitutes a literal, or at least a *constructive*, denial of the application because it "has precisely the same impact on [the applicant] as denial" on the merits. *Envtl. Def. Fund* v. *Hardin*, 428 F.2d 1093, 1099 (CADC 1970). "A reviewing court may treat administrative delay as a denial of what moving parties seek and provide immediate review." KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 14.12, at 54 (2d ed. 1983). See also *Clouser* v. *Espy*, 42 F.3d 1522, 1532 n.12 (CA9 1994) (administrator's refusal to

act on application qualifies as "written decision[] * * * related to issuance, denial, or administration" of application under 36 C.F.R. 251.82(a)), *cert. denied*, 515 U.S. 1141 (1995); *Pauley Petroleum, Inc.* v. *United States*, 591 F.2d 1308, 1323 n.23 (Ct. Cl.) (refusal to act eventually becomes "denial" of relief within meaning of APA § 555(e)), *cert. denied*, 444 U.S. 898 (1979).[15]

3. The conclusion that ATF "denied" respondent's application is confirmed by Section 925(c) and the implementing regulation promulgated by the Secretary, neither of which recognizes the indeterminate netherworld – neither granted nor denied – into which petitioners contend all applications fall under the appropriations statutes. The statute provides that an application to the Secretary will result in one of two forms of "final action": relief may either be "grant[ed]" or "denied." Further, not even petitioners can offer a theory under which Congress has repealed the right of individuals to "make application to the Secretary" (18 U.S.C. 925(c)), yet their argument turns this statutory right into an utterly empty exercise for the applicant. Congress also enacted the judicial review provision of Section 925(c) to *expand* the relief that the federal courts had already held to be available under the APA (see *supra* at 2), under which the Secretary's failure to act would plainly give rise to federal court ju-

[15] An agency's *failure* to act is similarly subject to judicial review when such inaction amounts to "the equivalent of an order denying relief." *Hardin*, 428 F.2d at 1099. See also *Coalition for Sustainable Res., Inc.* v. *United States Forest Serv.*, 259 F.3d 1244, 1251 (CA10 2001); *Sierra Club* v. *Glickman*, 156 F.3d 606, 618 n.7 (CA5 1998); *Sierra Club* v. *Thomas*, 828 F.2d 783, 793 (CADC 1987); *Dabone* v. *Karn*, 763 F.2d 593, 597 n.2 (CA3 1985) ("[W]e may treat the Board's unjustified failure to act within a reasonable period as an effective denial of the motion to reopen."); *Pub. Citizen Health Research Group* v. *FDA*, 740 F.2d 21, 32 (CADC 1984); *NRDC* v. *Fox*, 93 F. Supp. 2d 531 (S.D.N.Y. 2000), *aff'd*, 268 F.3d 91 (CA2 2001); *Zamore* v. *Dyer*, 597 F. Supp. 923, 928-31 (D. Conn. 1984) (treating agency inaction as denial and reversing as arbitrary and capricious). To hold otherwise would allow administrative agencies to preclude judicial review by simply ignoring requests put to them. *Sierra Club* v. *Thomas*, 828 F.2d at 793.

risdiction, as petitioners themselves concede (at 18). By contrast, this Court could hold that ATF has not "denied" respondent's application only by accepting that Congress amended the statute to *limit* the availability of judicial review.[16]

Moreover, Section 925(c) on its face indicates that Congress did not categorically intend to require the Secretary to take affirmative steps before a court may review an ATF denial because it allows the reviewing court in appropriate cases to "admit additional evidence." Section 925(c) thus contrasts with other statutes that permit judicial review only of, for example, "the Secretary's final decision *after such hearing* as is provided" at the administrative stage. 42 U.S.C. 1395cc(h)(1) (emphasis added), *discussed in Shalala* v. *Ill. Council on Long Term Care*, *supra*.

Finally, petitioners' reading cannot be reconciled with the regulation implementing Section 925(c), which provides that a firearms licensee who applies for relief may continue operating up to "30 days following the date the Director issues notification that the licensee's applications for removal of disabilities *has been denied*" (27 C.F.R. 178.44(i)(3) (emphasis added)). Petitioners' position would have the perverse and implausible effect of permitting licensees subject to firearms disabilities to operate indefinitely because their applications supposedly are never "denied" under the appropriations statutes.

Although petitioners emphasize (at 12) that Congress intended to preclude ATF from granting relief to firearms applicants, that fact does not abrogate the statutorily conferred jurisdiction of the district courts. Section 925(c) grants an unambiguous right to judicial review based on any "denial" of relief, whatever the reason. In any event, petitioners' argument in reality undermines their assertion of an implied repeal. It is common ground that Congress intended to require ATF to reject administrative applications for relief, whether because Congress

[16] Petitioners' contention that ATF's refusal to act does not trigger respondent's right to judicial review is thus irreconcilable with their contention (at 3, 18-21) that this case is governed by the APA.

believed that relief from firearms disabilities should *never* be granted (according to petitioners) or instead because it made a cost-benefit determination that ATF's large expenditures of funds justified shifting the funding for ATF's administrative process to another program (according to respondent). Whatever Congress's precise intention, there is no dispute that the appropriations bars have the same purpose and effect as a statutory mandate that ATF summarily deny all applications for relief from firearms disability. Such a purposeful and categorical refusal to grant relief falls squarely within Section 925(c)'s provision permitting persons whose applications are "denied" to seek judicial review.

Petitioners' position is also contrary to basic principles of administrative law. It would attribute to Congress an intent to permit the Secretary to evade judicial review of any application by refusing to take action, including with respect to applications by corporations, which even petitioners admit (at 3) may continue to seek relief in court notwithstanding the appropriations acts. In this respect, petitioners' position would also have the potential to undermine Congress's intent to provide judicial review under numerous other statutory schemes that condition the right to proceed to court on the "denial" of relief. None of these provisions suggests that the applicant need do more than exhaust available administrative remedies to secure judicial review.[17]

The weakness of petitioners' proposed interpretation of "denial" is ultimately demonstrated by the ease with which the single case they cite (at 18) is properly distinguished. *Your Home Visiting Nurse Services* v. *Shalala*, 525 U.S. 449 (1999), involved a section of the Medicare Act providing that judicial review was available with respect to "a final determination * * *

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[17] See, *e.g.*, 7 U.S.C. 136a(d)(3) (FIFRA); 8 U.S.C. 1160(e)(3)(A) (immigration); 8 U.S.C. 1421(c) (naturalization); 15 U.S.C. 766(c) (FERC); 15 U.S.C. 3412(c) (Natural Gas Act); 18 U.S.C. 843(e)(2) (explosives permits); 42 U.S.C. 6393(a)(4) (energy conservation); 42 U.S.C. 6976(a) (solid waste disposal); 42 U.S.C. 7194(b)(1) (adjustments relating to energy conservation); 42 U.S.C. 7661d(b)(2) (air pollution).

as to the amount of total program reimbursement." 42 U.S.C. 1395oo(a)(1)(A)(i). The question presented was whether jurisdiction existed over the agency's refusal to "reopen" a prior final determination. The Court held that judicial review was not available because a refusal to "reopen" was not a final determination as to the "amount of * * * reimbursement" (525 U.S. at 453) and further because Congress had not departed from "the traditional rule of administrative law that an agency's refusal to reopen a closed case is generally 'committed to agency discretion by law' and therefore exempt from judicial review" (*id.* at 455). This case, by contrast, presents no issue relating to the reopening of an agency decision.

B. Petitioners' Resort to Legislative History Is Unavailing.

Petitioners fare no better with their attempt to persuade the Court that the legislative history of the appropriations statutes establishes an implied repeal of Section 925(c). This Court's precedents are clear that "an implied repeal must ordinarily be evident from the language or operation of a statute." *Kremer* v. *Chem. Constr. Corp.*, 456 U.S. 461, 470 (1982). "The whole question depends on the intention of Congress *as expressed in the statutes*." *United States* v. *Will*, 449 U.S. 200, 222 (1980) (quoting *United States* v. *Mitchell*, 109 U.S. 146, 150 (1883) (emphasis added)). As such, "passing references" in legislative history do "not constitute the 'clear and manifest' evidence of congressional intent necessary to establish repeal by implication." *Rodriguez* v. *United States*, 480 U.S. 522, 525 (1987). See also *Allen* v. *McCurry*, 449 U.S. 90, 97-99 (1980). "[I]ndefinite congressional expressions" in legislative history simply "cannot negate plain statutory language and cannot work a repeal or amendment by implication." *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 788 (1981).

This rule makes perfect sense: not only is legislative history a far less accurate reflection of Congress's intent than statutory text but, at the most basic level, it lacks the force of law. To take the most obvious example, even a joint, unanimous declaration of both houses of Congress will not suffice to repeal a duly enacted statute, any more than would a unicameral veto (see *INS*

v. *Chadha*, 462 U.S. 919, 956 (1983)). Further, such arguments inevitably beg the question of *which* legislative history is relevant. Thus, petitioners repeatedly emphasize a few sentences from two 1992 committee reports regarding the appropriations measures but ignore altogether the legislative history of the supposedly repealed statute. "[E]ach time" Congress has amended Section 925(c), it has acted "with a concern toward those persons who possess guns in a lawful manner but are denied possession of firearms because of unrelated felony convictions." Pet. App. 24a. This legislative history, as a whole, demonstrates Congress's determinations that "not all persons convicted of felonies should be denied firearms privileges forever" and that "the judiciary [should] give the final word on the appropriateness of a denial" of relief under Section 925(c). *Id.* 22a.

Petitioners' contrary reliance on the legislative history of the appropriations measures is furthermore mystifying because there is *no* legislative history for the "ATF appropriations for fiscal year 1999" (J.A. 34 (ATF denial letter)) at issue in this case. Petitioners rely exclusively on statements that relate to earlier appropriations statutes, which are simply inapposite. There is not even any relevant legislative history for any of the appropriations statutes subsequent to 1995, the year in which the Third Circuit held in *Rice* v. *United States*, 68 F.3d 702 (1995), that judicial review was still available under Section 925(c) – except, that is, the failed attempt to include a provision to overrule that decision (see *supra* at 24). Only a minority of the members of the House of Representatives (161) and a thin majority of the members of the Senate (62) who voted on the 1999 appropriation at issue in this case even held those seats at the time of the 1992 remarks on which petitioners principally rely. Of these "returning" members, almost half of those who voted in favor of the 1992 appropriation (101) voted *against* the 1999 appropriation. But even engaging in the assumption that legislators, in considering ATF's F.Y. 1999 appropriation, were aware of or recalled the sentences from the extensive 1992 committee reports quoted by petitioners – and the utter and total absurdity of that vital assumption in petitioners' argument speaks for itself – those sentences do not purport to describe later appropriations.

"The recurrent nature of the appropriation process guarantees annual reconsideration" and thus "successive opportunities for political fragmentation." *Meek* v. *Pittenger*, 421 U.S. 349, 372 (1975), *overruled on other grounds*, *Mitchell* v. *Helms*, 530 U.S. 793 (2000). As *Amicus* VPC maintains (at 13), the "suspension of the legislation in the appropriations bill (as in this case) effectively forces Congress to revisit the issue each year as part of the annual appropriations process." The legislative history of the 1992 appropriation is accordingly totally uninformative here.

If anything, this is "a textbook case on why the courts should be hesitant to use legislative history to suspend any substantive right which is expressly available in statutes." Pet. App. 27a. Few issues are as hotly contested in Congress as firearms law. Sophisticated advocates on all sides maneuver to advance their agendas by passing legislation or, if that fails, planting supposed "legislative history" that is not necessary faithful to the statute as enacted or reflective of the views of most legislators. This Court ought not encourage such tactics by giving effect to such unreliable indicia of actual legislative intent.[18]

Even if the excerpts cited by petitioners were relevant, they still would not establish an implied repeal. The few sentences petitioners cite (at 4, 12-13) state the views not of the full House or Senate but instead, at most, of the respective appropriation committees. See, *e.g.*, S. Rep. No. 353, 102d Cong., 2d Sess. 1 (1992) ("The Committee on Appropriations * * * reports to the Senate with various amendments, and presents herewith information relative to the changes recommended."). This Court squarely rejected reliance on such materials in *TVA* v. *Hill*, 437 U.S. 153, 191-92 (1978), explaining that they cannot be "equated with statutes enacted by Congress," both because the appropriations committees lack jurisdiction over substantive legislation and because there is no evidence that "Congress as a whole" was even aware of, much less adopted, the committees'

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[18] For example, the 1996 House Report (H.R. Rep. No. 660, 104th Cong., 2d Sess. 26) asserts that ATF's appropriation eliminates the right to judicial review for certain felons, when that statement in reality relates to a version of the bill that Congress declined to adopt.

views. See also *id.* at 192 (declining to find an implied repeal based on "a few isolated statements" in lengthy committee reports (quoting *SEC* v. *Sloan*, 436 U.S. 103, 121 (1978)). The *TVA* Court explained this preference for the views of the committee with "jurisdiction" over the substantive issue by noting that the Appropriations Committee had not conducted "the type of extensive hearings which preceded passage" of the earlier substantive legislation allegedly repealed by appropriations (*id.* at 191), a fact that is equally true in this case (see *The Federal Firearms Owner Protection Act: Hearing Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983)).

There is, moreover, not a single reference in any of the reports petitioners cite to the availability of judicial review, much less a suggestion of an intent to repeal the statutory right to judicial review, *much less* a *clear and unambiguous* statement to that effect – which is, of course, what this Court's precedents actually require. See *supra* Part I. Nor is there any reason to believe that Congress viewed court proceedings under Section 925(c) to be problematic. In the entire period between the enactment of Section 925(c) in 1965 and the first appropriations ban in 1993, it appears that a court reinstated an individual's firearm rights only *once*. *In re Petition of Porrazzo*, 771 F. Supp. 304 (D. Nev. 1991).

Even with respect to the availability of relief under Section 925(c) generally, the legislative history of the various appropriations measures is filled only with "contradictory statements" that are objectively read as demonstrating that "Congress was concerned with the ATF's inefficient and wasteful administrative review process rather than a desire to curb the availability of relief itself." Pet. App. 20a, 24a. Supporters of the legislation emphasized that "[s]ince 1985, well over 2,000 waivers have been granted at a cost to taxpayers of nearly $10,000 per waiver," and that "[t]he total cost for the years from 1985 to 1991 for handling those waivers exceeded $20 million." *Stop Arming Felons Act: Hearing Before the Subcomm. on the Const. of the Comm. on the Judiciary*, 102d Cong., 2d Sess. 3 (1992) (Sen. Lautenberg). ATF's excessive spending was also a principal concern raised by the Violence Policy Center report that

gave rise to the public debate over the program. See *supra* at 3. Congress determined that those funds would be better spent fighting violent crime and thus reallocated them to the Armed Career Criminal Apprehension Program. See *supra* at 4. Indeed, at the time the appropriations ban was imposed, even the United States read it to reflect "Congress's choice not to fund firearms rights restoration procedures *during times of fiscal restraint*." Br. for the U.S., No. 93-445, *Beecham* v. *United States* 25 n.14 (emphasis added). Contra Pet. Br. 13, 21-23.

The most that can be said in support of the few excerpts from the committee reports cited by petitioners is that they reflect the view of the appropriations committees that ATF's large expenditures to investigate firearms applications were insufficient to justify the benefit received, in part because ATF had awarded relief too freely. The Senate Report accompanying the 1992 appropriation thus discusses the appropriations ban in terms of the cost-benefit calculus of continuing to fund the program:

> After ATF agents spend many hours investigating a particular applicant they must determine whether or not that applicant is still a danger to public safety. This is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made. The [Appropriations] Committee believes that the approximately 40 man-years spent annually to investigate and act upon these investigations and applications would be better utilized to crack down on violent crime.

S. Rep. No. 353, 102d Cong., 2d Sess. 19-20 (1992). The parallel House Report discusses the appropriations ban in the same terms:

> After ATF agents spend many hours investigating a particular applicant for relief, there is no way to know with any certainty whether the applicant is still a danger to public safety. Needless to say, it is a very difficult task. Thus, officials are now forced to make these decisions knowing that a mistake could have devastating consequences for innocent citizens. Thus, the [Appropriations] Committee believes that

> the $3.75 million and the 40 man-years annually spent investigating and acting upon these applications for relief would be better utilized by ATF in fighting violent crime. Therefore, the Committee has included language which states that no appropriated funds be used to investigate or act upon applications for relief from Federal firearms disabilities.

H.R. Rep. No. 618, 102d Cong., 2d Sess. 14 (1992). The Fifth Circuit's decision in this case accommodates *all* those concerns, eliminating the financial burden on ATF while simultaneously establishing an exceedingly high bar to restoring firearms rights.

Petitioners' claim (at 8) that the purpose of the appropriations statutes was categorically to prohibit every felon from possessing firearms not only is not supported by the committee reports on which they rely, but it also "attributes to Congress irrationality and arbitrariness" (*Morton* v. *Mancari*, 417 U.S. 535, 548 (1974)) that cannot sustain a claim of an implied repeal. No one would suggest, and Congress plainly did not conclude, that every felony conviction – no matter what the circumstances – establishes that an individual is permanently unsuited to possess firearms. This case is a perfect example. Cf. 18 U.S.C. 921(a)(20) (exempting most white-collar crimes). Petitioners also claim that "each annual appropriations law thus reflects Congress's considered judgment that 'those who commit felonies should not be allowed to have their right to own a firearm restored.'" Pet. Br. 13 (quoting H.R. Rep. No. 183, 104th Cong., 1st Sess. 15 (1995)). But the single sentence from the 1995 House Appropriations Committee Report petitioners quote cannot be reconciled with Section 921(a)(20), under which felons manifestly *are* "allowed to have their right to own a firearm restored." In more than a dozen states, the disability of Section 922(g)(1) is lifted immediately upon the expiration of the defendant's sentence or parole; numerous other states provide other mechanisms for relief from firearms disabilities. See *infra* at 15a. Congress elected to permit the broad and frequently automatic restoration of firearms rights under Section 921(a)(20) notwithstanding this Court's express recognition that it would essentially "circumvent" the narrower relief provision of Section 925(c). *Dickerson* v. *New Banner Inst.*, 460 U.S. 103, 117

(1983). Congress also was fully aware of the effect of Section 921(a)(20) in the debates over the appropriations measures,[19] but notably did not adopt proposals to repeal that provision. See, *e.g.*, S. 2304, 102d Cong., 2d Sess. § 2 (1992). The clause petitioners quote from the 1995 report thus most likely reflects the House Appropriations Committee's support for H.R. 2101, 104th Cong., 1st Sess. (1995), *reproduced infra* at 9a, which was being considered by the House Judiciary Committee that very month and which would have repealed both the ATF program and the right to judicial review and circumscribed the relief available under Section 921(a)(20), but which never passed.

For the foregoing reasons, this case stands in the most marked contrast to the previous instance in which this Court relied on legislative history to buttress its finding of an implied repeal, *United States* v. *Will*, *supra*. In four consecutive years, Congress "enacted statutes to stop or to reduce previously authorized cost-of-living increases initially intended to be automatically operative under [a pre-existing] statutory scheme" governing the salaries of various high-level government officials. 449 U.S. at 203. This Court held that Congress had thereby repealed the COLAs rather than deferring their payment and "consign[ing] them to the fiscal limbo of an account due but not payable." *Id.* at 224. The Court in *Will* held that the exceedingly strong presumption against implied repeals through appropriations law was overcome only based on an extraordinary array of evidence in the statutory text, which was supplemented and confirmed by the legislative history. For example, one of

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[19] *E.g.*, *Morning Edition: BATF Felon Gun Program A Campaign Issue?* (NPR radio broadcast July 30, 1992) (reporting view of then-Representative Charles Schumer, chair of the House Committee overseeing ATF, that "the bigger problem is not the BATF program * * * but that many states have their own programs to re-arm felons. Tens of thousands get their gun rights back automatically as soon as their sentences are complete."); David C. Morrison, *How Even the Strange Can Get Rearmed*, NAT'L J., Mar. 21, 1992, at 702 (reporting ATF official's statement that "[t]he real problem lies not in Washington but in state capitals * * * because convicted felons whose civil rights have been restored by state laws are exempted from the gun ban").

the statutes expressly stated that an annual COLA "shall not take effect," while the accompanying House Report stated that the COLA was thereby "eliminate[d]"; numerous "floor remarks of Senators and Representatives confirm[ed] this construction." *Id.* at 222 & n.24. The other statutes reflected the same intent, as confirmed not only by their sponsors but also by the accompanying reports and *dozens* of unambiguous, contemporaneous floor statements. *Id.* at 222-23 & nn.26-28. Not only is this case unlike *Will* because it does not involve "purely financial right[s] that Congress refused to fund" (Pet. App. 7a-8a & n.19), but petitioners are unable to point to even remotely analogous support in the text and legislative history of the provisos to ATF's appropriations for their claim of an implied repeal of the right to judicial review conferred by Section 925(c).

This case is instead controlled by *TVA* v. *Hill*, *supra*, which held that the Endangered Species Act was not partially repealed insofar as it applied to the Tellico Dam by Congress's decision to continue funding of the Dam. The Court found it critical that there was "nothing in the *appropriations measures, as passed*, which states that the Tellico Project was to be completed irrespective of the requirements of the Endangered Species Act." 437 U.S. at 189 (emphasis added). Although an array of statements in the House and Senate Appropriations Committees' Reports expressed the view that the Dam would not be subject to the ESA, those statements "cannot be equated with statutes enacted by Congress." *Id.* at 191. In any event, the Appropriations Committees lacked jurisdiction over environmental legislation, and "there is no indication that Congress as a whole was aware of TVA's position, although the Appropriations Committees apparently agreed with petitioner's views." *Id.* at 192.

C. There Is No Merit to Petitioners' Reliance on the Administrative Procedure Act.

Petitioners' final argument – that the relief respondent seeks is not available under the Administrative Procedure Act (Pet. Br. 18-19) – fails at the outset because this case is not subject to the APA. Indeed, petitioners' reading would render meaningless Congress's choice to adopt a special judicial review provision but not to apply the APA's standards to Section 925(c). When

Congress intends that the APA will apply to a statutory scheme, it regularly says so expressly.[20] Under Section 925(c) as originally enacted, the federal courts held that APA review was already available. *Kitchens* v. *Department of Treasury*, 535 F.2d 1197, 1199-1200 (CA9 1976). But Congress elected in 1986 to add a special judicial review provision. Act of May 19, 1986, Pub. L. No. 99-308, § 105(1)(D), 100 Stat. 449, 459. The original version of this bill would have applied the APA's standards – including particularly 5 U.S.C. 706, on which petitioners rely – but Congress eliminated that provision. S. 914, 98th Cong., 2d Sess. § 925(c) (1984) ("In a proceeding conducted under [Section 925(c)], the scope of judicial review shall be governed by [the APA]."); S. Rep. No. 583, 98th Cong., 2d Sess. 27 & n.58, 55-56 ("[S. 914] authorizes the scope of review provided under 5 USC 706."). In claiming that the APA governs the scope of judicial review under Section 925(c), petitioners inexplicably rely on the Senate Report for this version of the bill, which *was not adopted*. See Pet. Br. 3 (citing S. Rep. No. 583, *supra*, at 26-27 (1984)). "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983).[21]

Even assuming *arguendo* that the APA does apply to Section 925(c) proceedings, it obviously does so as a matter of judicial

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[20] See, *e.g.*, 12 U.S.C. 1818(h) (Section 8 of the Federal Deposit Insurance Act); 16 U.S.C. 1536(n) (Endangered Species Act); 18 U.S.C. 843(e)(2) (application to ATF for explosives materials license); 21 U.S.C. 360e(f)(4) (Food, Drug, and Cosmetic Act); 29 U.S.C. 214(c)(5)(G) (Fair Labor Standards Act); 30 U.S.C. 1416(d) (Deep Seabed Hard Mineral Resources Act); 42 U.S.C. 8433(d)(2)(B) (Power Plant and Industrial Fuel Use Act).

[21] Although the lower courts have held that the APA applies in this context, they uniformly have reached that conclusion by citing decisions applying the APA before Congress amended Section 925(c) to add a special judicial review provision. See, *e.g.*, *Bagdonas* v. *Department of Treasury*, 93 F.3d 422, 425 (CA7 1996) (citing *Bradley* v. *BATF*, 736 F.2d 1238, 1240 (CA8 1984)).

interpretation, not statutory mandate. But any tension between the ATF's appropriations statutes and a limitation on Section 925(c) that *the courts* have read into the statute cannot impliedly repeal the express statutory right to judicial review. Put another way, petitioners' argument under the APA not only fails to establish that this case presents the sort of manifest statement of congressional intent required for an implied repeal by appropriations law (*Will*, 449 U.S. at 220-21), but petitioners also fail to identify any conflict *at all* between the appropriations measures and the text of Section 925(c). In these circumstances, in order to reconcile the statutory texts (see *Morton* v. *Mancari*, 417 U.S. at 551), it is the application of the APA that either gives way or is modified. Thus, in *United States* v. *Fausto*, 484 U.S. 439 (1988), this Court held that the Civil Service Reform Act implicitly repealed government employees' right to file employment-related suits in the Claims Court, a right that the courts had previously inferred from the Back Pay Act. As the *Fausto* Court explained, although "it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change," the courts "frequently find" that Congress has repealed by implication "a legal disposition implied by a statutory text." *Id.* at 453.

Even assuming further that the APA applies with full force to Section 925(c) as petitioners assume, they nonetheless err in contending that the district courts are powerless to provide a remedy to a worthy applicant like respondent. Once again, petitioners' argument proceeds from the false premise that Congress has prohibited "the Secretary" from taking action on applications for firearms disabilities when in fact the appropriations statutes are expressly limited to ATF. See *supra* at 32-34. There is thus no obstacle to a district court "compel[ling]" the Secretary to grant relief or determining that the Secretary's failure to grant relief would be "arbitrary" or "unlawful[]." 5 U.S.C. 706.

Even if the Secretary of the Treasury were powerless to act as petitioners assert, district courts would have the authority under the APA to grant relief in appropriate cases without the necessity of a remand. That was the conclusion of the federal

courts even prior to Congress's enactment of a special judicial review provision. *Kitchens*, 535 F.2d at 1200. Petitioners' argument that a district court in the circumstances of this case may only compel agency action "unlawfully withheld or unreasonably delayed" (Pet. Br. 18-19 (citing 5 U.S.C. 706(1))) falsely assumes that the Secretary has "failed to act," when this case actually involves an affirmative "refusal to act." In these circumstances, the APA authorizes a district court to "hold unlawful and set aside agency action." 5 U.S.C. 706(2). See, *e.g.*, *First Am. Bank* v. *Resolution Trust Corp.*, 30 F.3d 644, 649 (CA5 1994); *Harrisburg Hosp.* v. *Shalala*, 48 F. Supp. 2d 467, 476 (M.D. Pa. 1999).[22] And the lawfulness of the Secretary's refusal to reinstate an applicant's right to keep and bear arms must, as in every instance of judicial review, be measured against the statutory standard for granting relief, not the rules governing the agency's funding. Contra Pet. Br. 19. The APA thus expressly provides for outright reversal of agency action that is "short of statutory right" or, depending on the scope of the district court's fact-finding, either "unsupported by substantial evidence" or "unwarranted by the facts." 5 U.S.C. 706(2)(C)-(F). In this case, not only does respondent have the "right" to have his firearms privileges restored under the standard set forth in Section 925(c), but the failure to do so is contrary to all the evidence in the case. The lower courts therefore acted properly in granting him relief.

In any event, the APA simply does not provide that a remand – relief that petitioners did not seek in the district court – is the exclusive remedy for an agency's "failure" or "refusal" to act. Petitioners notably fail to cite a single decision in the entire

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[22] Contrary to petitioners' claim (at 18) that the APA draws a distinction between agency "failure[s] to act" and "denials" by including both terms in the definition of "agency action" (5 U.S.C. 551(13)), the statutory definition simply conveys Congress's intent that essentially all final agency conduct – whether by way of action or inaction – is reviewable. Cf. *Evans* v. *United States*, 504 U.S. 255, 261, 268 (1992) ("bribery" and "extortion" are not mutually exclusive terms in the Hobbs Act).

history of the APA adopting such a categorical rule. If an agency were entitled to a "second bite at the apple" every time it made a poor decision, "administrative law would be a never ending loop from which aggrieved parties would never receive justice." *Nelson* v. *United States*, 64 F. Supp. 2d 1318, 1326 (N.D. Ga. 1999) (citation omitted). In cases like this one, the only entity that can provide the applicant the process to which he is due and that Congress has guaranteed is a court; there simply is no need for a remand because there is nothing left for the Secretary to do. A court may award relief denied by an agency rather than remand "if all essential factual issues have been resolved and the record adequately establishes a plaintiff's entitlement to benefits." KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 18.1, at 225 (3d ed. 1995 Supp.) (quoting *Faucher* v. *Secretary of Health & Human Servs.*, 17 F.3d 171, 176 (CA6 1994)). See also *Mowrey* v. *Heckler*, 771 F.2d 966, 973 (CA6 1985) (reversing agency decision when remand "unnecessary"). It would be particularly absurd for a federal court to refuse categorically to reverse unlawful agency action and to grant an individual relief to which he was entitled – precisely the result petitioners urge here – on the ground that the agency, for whatever reason, would not be able to grant relief on remand. The court could, should, and would grant appropriate relief itself.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.[23]

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[23] In the event the Court agrees with petitioners that the right to judicial review has been impliedly repealed, the case should be remanded to the Fifth Circuit for a determination whether respondent's Mexican conviction in fact subjects him to the disabilities of Section 922(g)(1). See BIO 9; Cert. Reply 1.

Respectfully submitted,

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June 14, 2002

APPENDIX

RELEVANT FEDERAL STATUTES

1. Section 921(a)(20) of Title 18, United States Code, provides:

The term "crime punishable by imprisonment for a term exceeding one year" does not include—

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

2. Section 925(c) of Title 18, United States Code, provides:

Exceptions: Relief from disabilities

(c) A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judi-

cial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter [18 USCS §§ 921 *et seq.*], who makes application for relief from the disabilities incurred under this chapter [18 USCS §§ 921 *et seq.*], shall not be barred by such disability, from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

3. Act of Nov. 12, 2001, Pub. L. No. 107-67, 115 Stat. 514 provides, in pertinent part:

* * * none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c); Provided further, that such funds shall be available to investigate and act upon applications filed by corporations for relief from Federal firearms disabilities under 18 U.S.C. 925(c).

Identical language can be found at: Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763A-129; Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 113 Stat. 434; Treasury and General Government Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-485; Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 111 Stat. 1277; Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-319; Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 471; Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2385; Treasury, Postal Service, and General Government Appropriations Act, 1994, Pub. L. No. 103-123, 107 Stat. 1228.

RELEVANT COMMITTEE REPORT EXCERPTS

1. H.R. Rep. No. 618, 102d Cong., 2d Sess. 13-14 (1992) states, in pertinent part:

Under current law, a person convicted of a crime punishable by imprisonment for a term exceeding one year may not lawfully possess, receive, ship, or transport firearms. In addition, other proscribed persons, *i.e.*, fugitives from justice, persons committed to mental institutions or adjudicated mentally incompetent, persons dishonorably discharged from the Armed Forces, citizens who have renounced citizenship, illegal aliens, and illegal drug users or addicts, are also under these disabilities.

The Bureau of Alcohol, Tobacco and Firearms (ATF) may grant relief from these disabilities where it is determined that the applicant for relief will not be likely to act in a manner dangerous to public safety and that the granting of relief would not be contrary to the public interest.

Under the relief procedure, ATF officials are required to guess whether a convicted felon or a person committed to a mental institution can be entrusted with a firearm. After ATF agents spend many hours investigating a particular applicant for relief, there is no way to know with any certainty whether the applicant is still a danger to public safety. Needless to say, it is a very difficult task. Thus, officials are now forced to make these decisions knowing that a mistake could have devastating consequences for innocent citizens.

Thus, the Committee believes that the $3.75 million and the 40 man-years annually spent investigating and acting upon these applications for relief would be better utilized by ATF in fighting violent crime. Therefore, the Committee has included language which states that no appropriated funds be used to investigate or act upon applications for relief from Federal firearms disabilities.

2. S. Rep. No. 353, 102d Cong., 2d Sess. 19-20 (1992) states, in pertinent part:

Under current law, a person convicted of a crime punishable by imprisonment for a term exceeding 1 year, may not lawfully posses, receive, ship, or transport firearms. ATF may grant relief from these disabilities where it is determined that the applicant for relief will not be likely to act in a manner dangerous to public safety and that the granting of relief would not be contrary to the public interest. Under the relief procedure, ATF officials are required to determine whether a convicted felon, including persons convicted of violent felonies or serious drug offenses, can be entrusted with a firearm. After ATF agents spend many hours investigating a particular applicant they must determine whether or not that applicant is still a danger to public safety. This is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made. The Committee believes that the approximately 40 man-years spent annually to investigate and act upon these investigations and applications would be better utilized to crack down on violent crime. Therefore, the Committee has included language in the bill which prohibits the use of funds for ATF to investigate and act upon applications for relief from Federal firearms disabilities. Under current policy, States have authority to make these determination and the Committee believes this is properly where the responsibility ought to rest. The Committee expects ATF to redeploy the positions and funding presently supporting firearms disability relief to the Armed Career Criminal program.

3. H.R. Rep. No. 127, 103d Cong., 1st Sess. 90 (1993) states, in pertinent part:

The Committee has continued language which * * * prohibits the use of funds to investigate or act upon applications for relief from Federal firearms disabilities.

4. S. Rep. No. 106, 103d Cong., 1st Sess. 20 (1993) states, in pertinent part:

Under current law, a person convicted of a crime punishable by imprisonment for a term exceeding 1 year, may not lawfully possess, receive, ship, or transport firearms. ATF may grant relief from these disabilities where it is determined that the applicant for relief will not be likely to act in a manner dangerous to public safety and that the granting of relief would not be contrary to the public interest. Under the relief procedure, ATF officials are required to determine whether a convicted felon, including persons convicted of violent felonies or serious drug offenses, can be entrusted with a firearm. After ATF agents spend many hours investigating a particular applicant they must determine whether or not that applicant is still a danger to public safety. This is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made. The Committee believes that the approximately 40 man-years spent annually to investigate and act upon these investigations and applications would be better utilized to crack down on violent crime. Therefore, the Committee has continued language in the bill which prohibits the use of funds for ATF to investigate and act upon applications for relief from Federal firearms disabilities. Under current policy, States have authority to make these determinations and the Committee believes that this is where the responsibility ought to rest. This provision shall not apply to applications filed by corporations.

5. H.R. Conf. Rep. No. 256, 103d Cong., 1st Sess. 25 (1993) states, in pertinent part:

Amendment No. 11: Inserts a provision proposed by the Senate which provides that the Bureau of Alcohol, Tobacco and Firearms may investigate and act upon applications filed by corporations (but not for individuals) for relief from Federal Firearms disabilities.

6. S. Rep. No. 286, 103d Cong., 2d Sess. (1994) contains no relevant statements.

7. H.R. Rep. No. 534, 103d Cong., 2d Sess. 92 (1994) states, in pertinent part:

The Committee has continued language which * * * prohibits the use of funds to investigate or act upon application for relief from Federal firearms disabilities.

8. H.R. Rep. No. 183, 104th Cong., 1st Sess. 15 (1995) states, in pertinent part:

For the fourth consecutive year, the Committee has added bill language prohibiting the use of Federal funds to process applications for relief from Federal firearms disabilities. The Committee understands the controversial nature of the underlying law allowing convicted felons to have their right to own a firearm restored. However, those who commit serious crimes forfeit many rights and those who commit felonies should not be allowed to have their right to own a firearm restored. We have learned sadly that too many of these felons whose gun ownership rights were restored went on to commit violent crimes with firearms. There is no reason to spend the Governments' time or taxpayer's money to restore a convicted felon's right to own a firearm.

9. S. Rep. No. 121, 104th Cong., 1st Sess. (1995) contains no relevant statements.

10. H.R. Rep. No. 660, 104th Cong., 2d Sess. 26 (1996) states, in pertinent part,

The Committee has modified a continuing provision prohibiting the Bureau of Alcohol, Tobacco and Firearms from acting upon applications for relief from Federal firearms disabilities. The modification holds that refusal to act upon such applications shall not be subject to judicial review for any felon convicted of

a violent crime, firearms violation, or drug related crime. [Note, the amendment to which this statement refers was not adopted.]

11. S. Rep. No. 330, 104th Cong., 2d Sess. (1996) contains no relevant statements.

12. H.R. Rep. No. 240, 105th Cong., 1st Sess. 95 (1997) contains no relevant statements.

13. H.R. Rep. No. 592, 105th Cong., 2d Sess. (1998) states, in pertinent part:

The Committee has continued language * * * prohibiting the use of funds to investigate or act upon applications for relief from Federal firearms disabilities.

14. H.R. Rep. No. 231, 106th Cong., 1st Sess. 80 (1999) states, in pertinent part:

The Committee has continued language which * * * prohibits the use of funds to investigate or act upon applications for relief from Federal firearms disabilities.

15. H.R. Rep. No. 756, 106th Cong., 2d Sess. 103 (2000) states, in pertinent part:

The Committee has continued language * * * prohibiting the use of funds to investigate or act upon applications for relief from Federal firearms disabilities.

16. H.R. Rep. No. 152, 107th Cong., 1st Sess. 97 (2001) states, in pertinent part:

The Committee has continued language which * * * prohibits the use of funds to investigate or act upon applications for relief from Federal firearms disabilities.

FAILED ATTEMPTS TO REPEAL OR AMEND 18 U.S.C. 925(c)

Stop Arming Felons Act, S. 2304, 102d Cong., 2d Sess. § 3 (1992), and *Stop Arming Felons Act*, S. 1400, 103d Cong., 1st Sess. § 3 (1993) provide:

(a) IN GENERAL—Section 925(c) of title 18, United States Code, is amended—

(1) in the first sentence, by inserting '(other than a natural person)' before 'who is prohibited';

(2) by striking the second and third sentences;

(3) in the fourth sentence—

(A) by inserting 'person (other than a natural person) who is a' before 'licensed importer'; and

(B) by striking 'his' and inserting 'the person's'; and

(4) in the fifth sentence, by inserting '(i) the name of the person, (ii) the disability with respect to which the relief is granted, and, if the disability was imposed by reason of a criminal conviction of the person, the crime for which and the court in which the person was convicted, and (iii)' before 'the reasons therefor'.

(b) APPLICABILITY—The amendments made by subsection (a) shall apply to—

(1) applications for administrative relief and actions for judicial review that are pending on the date of enactment of this Act; and

(2) applications for administrative relief filed and actions for judicial review brought after the date of enactment of this Act.

Stop Arming Felons Act, S. 1068, 104th Cong., 1st Sess. §§ 2-3 (1995), *Stop Arming Felons Act*, H.R. 2101, 104th Cong., 1st Sess. §§ 2-3 (1995), *Stop Arming Felons Act*, H.R. 1228, 105th Cong., 1st Sess. §§ 2-3 (1997), *Stop Arming Felons Act*, H.R. 2281, 106th Cong., 1st Sess. §§ 2-3 (1999), and *ENFORCE Act*, H.R. 4066, 106th Cong., 2d Sess. §§ 301-302 (2000) provide:

ADMINISTRATIVE RELIEF FROM CERTAIN FIREARMS AND EXPLOSIVES PROHIBITIONS.

(a) IN GENERAL—

(1) Section 925(c) of title 18, United States Code, is amended—

(A) in the first sentence by inserting '(other than a natural person)' before 'who is prohibited';

(B) in the fourth sentence—

(i) by inserting 'person (other than a natural person) who is a' before 'licensed importer'; and

(ii) by striking 'his' and inserting 'the person's'; and

(C) in the fifth sentence, by inserting '(i) the name of the person, (ii) the disability with respect to which the relief is granted, (iii) if the disability was imposed by reason of a criminal conviction of the person, the crime for which and the court in which the person was convicted, and (iv)' before 'the reasons therefor'.

(2) Section 845(b) of title 18, United States Code, is amended—

(A) in the first sentence, by inserting '(other than a natural person)' before 'may make application to the Secretary'; and

(B) in the second sentence, by inserting '(other than a natural person)' before 'who makes application for relief'.

(b) APPLICABILITY—The amendments made by subsection (a) shall apply to—

(1) applications for administrative relief and actions for judicial review that are pending on the date of enactment of this Act; and

(2) applications for administrative relief filed, and actions for judicial review brought, after the date of enactment of this Act.

PERMANENT FIREARM PROHIBITION FOR CONVICTED VIOLENT FELONS AND SERIOUS DRUG OFFENDERS.

Section 921(a)(2) of title 18, United States Code, is amended—

(1) in the first sentence—

(A) by inserting '(A)' after '(20)'; and

(B) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively;

(2) in the second sentence, by striking 'What' and inserting the following:

'(B) What'; and

(3) by striking the third sentence and inserting the following new subparagraph:

'(C) A conviction shall not be considered to be a conviction for purposes of this chapter if—

'(i) the conviction is reversed or set aside based on a determination that the conviction is invalid;

'(ii) the person has been pardoned, unless the authority that grants the pardon expressly states that the person may not ship, transport, possess, or receive firearms; or

'(iii) the person has had civil rights restored, or the conviction is expunged, and—

'(I) the authority that grants the restoration of civil rights or expungement expressly authorizes the person to ship, transport, receive, and possess firearms

and expressly determines that the circumstances regarding the conviction and the person's record and reputation are such that the person is not likely to act in a manner that is dangerous to public safety, and that the granting of the relief is not contrary to the public interest; and

'(II) the conviction was for an offense other than a serious drug offense (as defined in section 924(e)(2)(A)) or violent felony (as defined in section 924(e)(2)(B)).'.

[Note: the text of H.R. 4066 varies slightly from the others. Subsection (3)(C)(iii) of the section entitled "PERMANENT FIREARM PROHIBITION FOR CONVICTED VIOLENT FELONS AND SERIOUS DRUG OFFENDERS" of that bill reads:

'(C) A State conviction shall not be considered to be a conviction for purposes of this chapter if the person has been pardoned, has had restored any civil rights taken away by virtue of the conviction, or the conviction is expunged, and—

'(i) the authority that grants the pardon, the restoration of civil rights, or the expungement expressly authorizes the person to ship, transport, receive, and possess firearms and expressly determines that the circumstances regarding the conviction and the person's record and reputation are such that the person is not likely to act in a manner that is dangerous to public safety, and that the granting of the relief is not contrary to the public interest; and

'(ii) the conviction was for an offense other than a serious drug offense (as defined in section 924(e)(2)(A)) or violent felony (as defined in section 924(e)(2)(B)).'].

ENFORCE Act, S. 2338, 106th Cong., 2d Sess. § 301 (2000) provides:

(a) IN GENERAL –

(1) FIREARMS—Section 925(c) of title 18, United States Code, is amended—

(A) by inserting '(1)' after '(c)';

(B) in the first sentence, by inserting '(other than a natural person)' before 'who is prohibited';

(C) in the fourth sentence—

(i) by inserting 'person (other than a natural person) who is a' before 'licensed importer'; and

(ii) by striking 'his license' and inserting 'the license of that person'; and

(D) by striking the last sentence and inserting the following:

'(2) Whenever the Secretary grants relief under this section to any person, the Secretary shall promptly publish notice of such action in the Federal Register, which shall include—

(A) the name of the person;

(B) the disability with respect to which the relief is granted;

(C) if the disability was imposed by reason of a criminal conviction of the person, the crime for which and the court in which the person was convicted; and

(D) the reasons for the decision of the Secretary.'

(2) EXPLOSIVE MATERIALS—Section 845(b) of title 18, United States Code, is amended—

(A) in the first sentence, by inserting '(other than a natural person)' before 'may make application to the Secretary'; and

(B) in the second sentence, by inserting '(other than a natural person)' before 'who makes application for relief'.

(b) APPLICABILITY—The amendments made by subsection (a) shall apply to any application for administrative relief and any action for judicial review that—

(1) is pending on the date of enactment of this Act; and

(2) is brought or filed on or after that date.

PERMANENT FIREARM PROHIBITION FOR CONVICTED VIOLENT FELONS AND SERIOUS DRUG OFFENDERS

Section 921(a)(2) of title 18, United States Code, is amended—

(1) in the first sentence—

(A) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively; and

(B) by inserting '(A)' after '(20)';

(2) in the second sentence, by striking 'What' and inserting the following:

'(B) What'; and

(3) by striking the third sentence and inserting the following new subparagraph:

'(C) A conviction shall not be considered to be a conviction for purposes of this chapter if—

'(i) the conviction is for an offense other than a serious drug offense (as defined in section 924(e)(2)(A)) or violent felony (as defined in section 924(e)(2)(B));

'(ii) the person is pardoned or has restored any civil right taken away by virtue of the conviction, or the conviction is expunged, and

'(iii) the authority that grants the pardon, the restoration of civil rights, or the expungement—

'(I) expressly authorizes the person to ship, transport, receive, and possess firearms; and

'(II) expressly determines that the circumstances regarding the conviction and the person's record and reputation are such that the person is not likely to act in a manner that is dangerous to public safety, and that the granting of the relief is not contrary to the public interest.'.

STATE RESTORATION STATUTES

States generally restoring firearms rights automatically:

Alaska (ALASKA STAT. § 15.05.030 (Michie 2001))

Colorado (Colo. Const. Art. VII, § 10)

Delaware (Del. Code Ann. Tit. 11, § 4347(i) (2001))

Florida (Fla. Stat. Ann. § 940.05 (West 2001))

Hawaii (Haw. Rev. Stat. § 831-5 (2001))

Kansas (Kan. Stat. Ann. § 22-3722 (2001))

Louisiana (La. Const. Art. I, § 20)

Minnesota (Minn. Stat. Ann. § 609.165 (West 2001))

Montana (Mont. Code Ann. § 46-18-801(3) (2001))

Nebraska (Neb. Rev. Stat. § 29-112.01 (2001))

New Hampshire (N.H. Rev. Stat. Ann. § 607-A:5 (2002))

Oregon (Or. Rev. Stat. § 137.281(5) (2001))

South Dakota (S.D. Codified Laws § 23A-27-35 (Michie 2001))

Tennessee (Tenn. Code Ann. § 40-29-101 (2001))

States generally providing for judicial restoration of firearms rights:

Arizona (Ariz. Rev. Stat. Ann. § 13-905, -909, -910 (West 1989))

Mississippi (Miss.Code Ann. § 97-37-5 (2001))

New York (N.Y. Correct. Law § 702(1) & (2) (McKinney 1987))

Ohio (Ohio Rev. Code Ann. § 2923.14 (Anderson 2002))

Washington (Wash. Rev. Code Ann. § 9.92.066 (West 1988)

TREASURY DEPARTMENT ORDER ESTABLISHING BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

Internal Revenue Service (I.R.S.)

Treasury Department Order

ESTABLISHMENT OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

June 6, 1972

By virtue of the authority vested in me as Secretary of the Treasury, including the authority in Reorganization Plan No. 26 of 1950, it is ordered that:

1. The purpose of this Order is to transfer, as specified herein, the functions, powers and duties of the Internal Revenue Service arising under laws relating to alcohol, tobacco, firearms, and explosives (including the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service) to the Bureau of Alcohol, Tobacco and Firearms (hereinafter referred to as the Bureau) which is hereby established. The Bureau shall be headed by the Director, Bureau of Alcohol, Tobacco and Firearms (hereinafter referred to as the Director). The Director shall perform his duties under the general direction of the Secretary of the Treasury (hereinafter referred to as the Secretary) and under the supervision of the Assistant Secretary (Enforcement, Tariff and Trade Affairs, and Operations) (hereinafter referred to as the Assistant Secretary).

2. The Director shall perform the functions, exercise the powers, and carry out the duties of the Secretary in the administration and enforcement of the following provisions of law:

* * * * *

(d) 18 U.S.C. Chapter 44 (relating to firearms);

* * * * *

Supreme Court, U.S.
FILED
JUL 17 2002
OFFICE OF THE CLERK

No. 01-704

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

THOMAS LAMAR BEAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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In the Supreme Court of the United States

No. 01-704

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

THOMAS LAMAR BEAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

Respondent contends that a district court has authority under 18 U.S.C. 925(c) to award convicted felons relief from their firearms disabilities. As an initial matter, he argues for the first time in these proceedings that the Secretary of the Treasury retains authority to award relief from firearms disabilities, notwithstanding that the Act appropriating funds to the Bureau of Alcohol, Tobacco, and Firearms (ATF) bars the use of funds to act on applications for relief. He then argues that, in any event, the Secretary's failure to act on an application for relief constitutes a "denial" of relief that is subject to judicial review, and that, on review of such a denial, a district court may decide independently that an applicant is eligible for and warrants relief, and may award the applicant that relief. Each of those arguments is incorrect.

Because the Secretary has delegated his authority to implement Section 925(c) to the Director of the ATF, he does not have authority to act on his own. But even if the Secretary had retained authority to act on his own, established principles of appropriation law would preclude him from cir-

cumventing the appropriations bar by invoking that authority.

Nor did Congress intend for district courts to assume the role that ATF had previously performed. A district court has never had authority under Section 925(c) to decide independently that an applicant satisfies the statutory preconditions and warrants relief as a matter of discretion, or to award relief on its own. The appropriations bar does not invest a court with that authority for the first time.

In addition, Section 925(c) only authorizes judicial review of the Secretary's "denial" of an application. In light of the appropriations bar, the Secretary may neither grant nor deny an application; instead, he must decline to act on the merits of the application. As a result, the essential predicate for judicial review under Section 925(c)—a "denial" of an application—is lacking. Moreover, even if the Secretary's failure to act on an application were treated as a "denial" of relief within the meaning of Section 925(c), the Administrative Procedure Act (APA) would supply the standards for judicial review, and would preclude a district court from setting aside that "denial" because the Secretary's failure to act is compelled by the appropriations bar,

A district court's exercise of authority to afford relief from firearms disabilities would also give rise to the very dangers that Congress sought to avert when it enacted the appropriations bar. Congress suspended the Secretary's authority to relieve convicted felons of their firearms disabilities because it concluded that providing such relief endangers public safety. That risk would not be diminished if a court awarded relief. Indeed, because a judicial determination would be based largely on a one-sided record created by the applicant, rather than an impartial investigation conducted by ATF, the risks to the public would be even greater.

Respondent argues that the government has failed to demonstrate that Congress impliedly repealed Section 925(c).

But this case does not involve any issue of implied repeal. Congress expressly barred the Secretary from acting on applications for relief under Section 925(c). Congress did not, however, repeal judicial authority under Section 925(c), and judicial authority under that provision therefore remains intact. To be sure, respondent cannot obtain relief from firearms disabilities under Section 925(c). But that is because Section 925(c) has never authorized courts to decide independently that an applicant may obtain relief, because Section 925(c) does not authorize review of a failure by the Secretary to act on an application, and because the Secretary's decision not to act on the merits of an application would have to be sustained even if Section 925(c) did provide for such review.

A. The Secretary May Not Act On Applications For Relief From Firearms Disabilities

Respondent contends (Br. 32-34) for the first time in these proceedings that the Secretary retains authority to act on applications for relief from firearms disabilities notwithstanding the appropriations bar in each annual appropriations law since 1992. In particular, he argues that, because the appropriations bar appears in the appropriation for ATF, it does not limit the Secretary's authority to grant relief from firearms disabilities on his own, without the assistance of ATF. That contention is incorrect for two reasons.

First, as Congress was obviously aware when it enacted the appropriations bar, the Secretary has delegated his authority to act on applications for relief under Section 925(c) to the Director of ATF. Treas. Dep't Order No. 221, §§ 1, 2(d) (June 6, 1972); 27 C.F.R. 178.144. The Secretary therefore does not have authority to grant relief from firearms disabilities on his own. See *United States* v. *Nixon*, 418 U.S. 683, 695-696 (1974); *Accardi* v. *Shaughnessy*, 347 U.S. 260, 266-267 (1954). It is true that the Secretary's delegation order specifies that the Director of ATF shall exercise the

Secretary's authority under Section 925(c) subject to "the general direction of the Secretary." Treas. Dep't Order No. 221, §1. But in light of the appropriations bar, any direction from the Secretary to the Director to act upon applications for relief from firearms disabilities would be unlawful. Respondent does not argue that the Secretary was required to rescind the delegation of authority to ATF. And it plainly was not arbitrary or capricious for him to decline to do so in light of the manifest congressional policy expressed in the statutory bar included in each year's annual appropriations act and the impracticality of the Secretary personally conducting the necessary investigations.

Second, even if the Secretary had retained or recalled his authority to grant relief from firearms disabilities, the Act of Congress making appropriations of funds to the Department of Treasury does not include any funding that the Secretary may use for that purpose. No money appropriated to the Secretary is specifically designated for use in acting on applications for relief from firearms disabilities. While Congress has appropriated money to the Department of Treasury for certain general purposes, Treasury and General Government Appropriations Act, 2002, Pub. L. No. 107-67, 115 Stat. 514, use of that money to act upon applications for relief from firearms disabilities would constitute an impermissible circumvention of the appropriations bar, and therefore an expenditure for an unauthorized purpose, in violation of 31 U.S.C. 1301(a). Under a fundamental background principle of appropriations law, "an appropriation made for a specific purpose is available for that purpose to the exclusion of a more general appropriation that might also include that purpose." 64 Comp. Gen. 138, 140 (1984); see 36 Comp. Gen. 526, 528 (1957); 31 Comp. Gen. 491, 492 (1952); 19 Comp. Gen. 892, 893-894 (1940); 17 Comp. Gen. 974, 976 (1938); 4 Comp. Gen. 476, 478 (1924). That principle prevents circumvention of congressional spending limits, and is consistent with the

general rule of statutory construction that "a specific statute will not be controlled or nullified by a general one." *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). Here, the use of a general appropriation to implement a program for which Congress has expressly barred the use of *any* appropriated funds would constitute an even greater circumvention of Congress's appropriation authority.

That is particularly true in the present context. Congress enacted the appropriations bar in order to protect the public from potentially dangerous convicted felons, and to direct the resources previously expended on applications for relief from firearms disabilities to the important task of fighting crime. U.S. Opening Br. 4, 12-13 & n.5. It is implausible to believe that Congress intended to undercut those purposes by allowing the Secretary to use money from a general appropriation to investigate and act upon such applications himself.

B. A Court Has Never Had Authority To Decide Independently That An Applicant Satisfies Eligibility Requirements And Warrants Discretionary Relief From Firearms Disabilities, Or To Award Relief Itself

Respondent contends (Br. 31-32) that, even if the appropriations bar suspends the Secretary's authority to grant relief from firearms disabilities, a court has authority to decide independently that an applicant satisfies the statutory and regulatory preconditions and warrants relief as a matter of discretion, and to award such relief. But a court has never had such authority under Section 925(c). The text of Section 925(c) allocates that authority exclusively to the Secretary. Under Section 925(c), it is "the Secretary" who is authorized to "grant such relief," and only when it is established "to his satisfaction" that the preconditions for relief have been met. 18 U.S.C. 925(c). Moreover, even when the Secretary determines that the preconditions for relief have

been satisfied, the Secretary is not required to grant it. Section 925(c) provides only that the Secretary "may" grant relief in those circumstances. As a result, the Secretary may, as a matter of discretion, decline to grant relief to certain individuals or categories of individuals even if they might otherwise be able to satisfy the statutory preconditions. See, *e.g.*, 27 C.F.R. 178.144(d) (ordinarily no relief will be granted "if the applicant has not been discharged from parole or probation for a period of at least 2 years"); *ibid.* ("Relief will not be granted to an applicant who is prohibited from possessing all types of firearms by the law of the State where such applicant resides.").

The text of Section 925(c) does not grant authority to a court to determine whether the preconditions for relief have been met "to its satisfaction," or to decide as a matter of discretion who among the class of eligible applicants "may" obtain relief, or to "grant such relief." Instead, the court may only "review" the Secretary's "denial" of relief. 18 U.S.C. 925(c). While the text of Section 925(c) is silent on the scope of that review, the APA supplies the governing standards. 5 U.S.C. 704 (actions reviewable under the APA include "[a]gency action made reviewable by statute"); 5 U.S.C. 706 (setting forth the scope of review for any "agency action"). Under the APA, a court may review agency action for the limited purpose of determining whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Absent statutory authorization to do so, a court is not empowered "to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985). Moreover, if the court finds that agency action is not justified on the existing record under the applicable standards, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Ibid.*

"[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration." *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952).

Thus, even before the enactment of the appropriations bar, a district court lacked authority to determine independently that an applicant satisfied the preconditions for removal of firearms disabilities and warranted that relief as a matter of discretion, or to award such relief. The appropriations bar—which now bars even the Secretary from granting relief—did not *sub silentio* vest such extraordinary de novo authority in the courts for the first time. Indeed, respondent does not identify any language in the annual appropriations bar, Section 925(c), or the APA that would support such an exercise of judicial authority.[1]

C. A District Court Does Not Have Authority Under Section 925(c) To Review The Secretary's Failure To Act Upon Applications For Relief

1. Respondent's contention that a district court has authority to grant relief from firearms disabilities under

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[1] Relying on an administrative law treatise, respondent argues (Br. 50) that a court may award relief when the record clearly establishes that a party has satisfied the preconditions for relief. This Court has never endorsed such an expansive exception to the principle that a court must remand a case to the agency after finding the agency's decision unjustified. Such an exception would fail to respect an agency's authority to reopen the record and gather additional evidence that might alter the propriety of an award of relief. It also would fail to recognize an agency's authority to exercise its discretion to deny relief even when the statutory preconditions for relief have been satisfied. Moreover, the most recent edition of the treatise cited by respondent asserts that where the record establishes a party's entitlement to relief and further delay would be unjust, "[a] reviewing court *can order an agency* to provide the relief it denied." Richard J. Pierce, Jr., *Administrative Law Treatise* § 18.1, at 1323 (4th ed. 2002) (emphasis added). It does not assert that a court itself may provide the relief sought by a party.

Section 925(c) is incorrect for a second reason. An essential predicate for judicial review under Section 925(c) is the Secretary's issuance of a "denial" of relief. 18 U.S.C. 925(c). Because the appropriations bar precludes the Secretary from "act[ing] "upon" applications for relief, the Secretary is powerless to issue such a denial.

Respondent contends (Br. 35) that the Secretary's failure to act on an application for relief is a "denial" of relief within the meaning of Section 925(c). But in the context of agency action, a denial of relief means a decision on the merits rejecting a request for relief, not a failure to act on such a request.

The APA's definitional section expressly treats a "denial" and a "failure to act" as two distinct forms of agency action. 5 U.S.C. 551(13). That distinction, moreover, is carried over into the standards for reviewing agency action. When an agency issues a decision on the merits, a court shall "hold unlawful and set aside agency action, findings and conclusions found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). In contrast, when final agency action takes the form of a failure to act, a court may only "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. 706(1). See *Sierra Club* v. *Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987); *Public Citizen Health Research Group* v. *FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984). Because the Secretary's failure to act on respondent's application for relief did not reject respondent's claim on the merits, it did not constitute a "denial" of relief reviewable under Section 925(c).

Environmental Defense Fund, Inc. v. *Hardin*, 428 F.2d 1093 (D.C. Cir. 1970), cited by respondent (Br. 35), does not suggest otherwise. That case holds only that a failure to act is subject to review as final agency action when its effect is equivalent to the effect of a denial of relief. *Id.* at 1098-1099. It does not hold that a failure to act *is* a denial of relief. *Ibid.* The other cases respondent cites (Br. 35-36 & n.15) also do not hold that a failure to act is a denial of relief.[2]

Respondent also errs in contending (Br. 35, 49) that ATF's decision should be treated as a denial of relief because it constituted a "refusal" to act. A refusal to act on an application, as required by an Act of Congress, no more constitutes a decision on the merits than any other kind of failure to act.

2. Respondent contends (Br. 34-35) that if a failure to act is not treated as a denial of relief, the result would conflict with the presumption that Congress intends for there to be judicial review of final agency action. There is no such conflict. Although respondent may not seek judicial review under Section 925(c) in these circumstances, respondent

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[2] *Clouser* v. *Espy*, 42 F.3d 1522, 1532 n.12 (9th Cir. 1994), stated that a District Ranger's refusal to act on a proposed plan of operations "appears to qualify" as a decision "related to issuance, denial or administration of * * * written instruments to occupy and use National Forest System Lands," and that "[s]uch rulings are appealable under the Forest Service regulations." *Ibid.* *Pauley Petroleum, Inc.* v. *United States*, 591 F.2d 1308, 1323 n.23 (Ct. Cl.), cert. denied, 444 U.S. 898 (1979), held that the Secretary of Interior's failure to act on an application did not constitute a "denial" of an application within the meaning of 5 U.S.C. 555(e). That court stated in dicta that "an indefinite refusal to act might at some point constitute a 'denial.'" *Ibid.* Four other circuit court decisions cited by respondent (Br. 36 n.15) held that a failure to act may in some circumstances be reviewed as final agency action, not that a failure to act is a denial of relief. *Coalition for Sustainable Res., Inc.* v. *United States Forest Serv.*, 259 F.3d 1244, 1251 (10th Cir. 2001); *Sierra Club* v. *Glickman*, 156 F.3d 606, 618 n.7 (5th Cir. 1998); *Sierra Club* v. *Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987); *Public Citizen Health Research Group* v. *FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984). The final circuit court decision cited by respondent observed that it could "treat an unjustified failure to act within a reasonable period as an effective denial of [a] motion to reopen" where the consequence otherwise would have been deportation of a resident alien. *Dabone* v. *Karn*, 763 F.2d 593, 597 n.2 (3d Cir. 1985). That statement was unnecessary to the court's decision because the court ultimately held that it had authority to act under 28 U.S.C. 1651. *Ibid.*

could have obtained judicial review of the Secretary's failure to act on his application in another way. Because the ATF Director issued a final decision that he would not act on respondent's application, respondent could have sought judicial review under the APA, which authorizes judicial review of final agency action when there is no other adequate remedy in a court. 5 U.S.C. 704. In such an action, respondent could have invoked the provision of the APA that authorizes a court to "compel agency action unlawfully withheld." 5 U.S.C. 706(1). That action would have failed on the merits, however, because the Director's refusal to act upon respondent's application was entirely lawful.

By eschewing the APA and attempting to proceed under Section 925(c), respondent sought to invoke the court's authority under that Section to "admit additional evidence," as a springboard for obtaining a de novo judicial determination that he was entitled to relief from his firearms disabilities. Had respondent sought review in the manner provided by Congress, arguing that the Director's failure to act constituted final agency action and was unlawful under the APA, 5 U.S.C. 704, 706(1), he could not have invoked the court's "additional evidence" authority under Section 925(c), and a court plainly would not have had authority to grant relief from firearms disabilities. Thus, respondent's argument that a court may receive and weigh evidence in the first instance and award relief in a case such this is contrary not only to Section 925(c) and the judgment of Congress in the appropriations bar, but also to the text of the APA and fundamental principles of administrative law.

3. Respondent's remaining arguments for treating a failure to act as a "denial" of relief under Section 925(c) are also unpersuasive. Respondent contends (Br. 38) that unless a failure to act may be reviewed under Section 925(c), the Secretary could escape review of a decision to refuse to process applications for relief filed by corporations, even

though the appropriations bar does not apply to corporate applications. If the Secretary adopted such a practice, however, it too would be subject to review under the APA as final agency action for which there is no other adequate remedy in a court. The same basic flaw inheres in respondent's contention (Br. 36-37) that a failure to act must constitute a denial of relief because Section 925(c) refers only to grants and denials of relief. Congress's failure to address anything other than grants and denials in Section 925(c) simply means that Congress intended for the consequences of other responses by the Secretary, such as a failure to act, to be governed by other applicable provisions of law, such as the APA.

D. The Secretary's Compliance With The Appropriations Bar Would Not In Any Event Furnish A Basis For Setting Aside The Secretary's Action

There is a third reason that a court may not order relief from firearms disabilities under Section 925(c). Even if the Secretary's failure to act triggered a right to judicial review under Section 925(c), the scope of that review would be governed by the APA, which limits review to a determination whether an agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). As long as the appropriations bar is in effect, the Secretary's failure to act on an application for relief from firearms disabilities does not fall into any of those categories. To the contrary, it is required by law. Thus, if the Secretary's failure to act were reviewable under Section 925(c), it would result in an affirmance of the Secretary's decision.

1. Respondent contends (Br. 46-47) that review under Section 925(c) is not governed by APA standards. By its express terms, however, the APA applies to "[a]gency action made reviewable by statute." 5 U.S.C. 704. Morever, the APA's scope of review provision applies categorically to any

"agency action." 5 U.S.C. 706. Accordingly, "a reviewing court must apply the APA's court/agency review standards in the absence of an exception." *Dickinson* v. *Zurko*, 527 U.S. 150, 154 (1999); see *ICC* v. *Bortherhood of Locomotive Engineers*, 482 U.S. 270, 282 (1987). Nothing in the text of Section 925(c) suggests that Congress intended to displace the APA's standards of review. To the contrary, the text of Section 925(c) is silent regarding the scope of judicial review, confirming that Congress intended for traditional APA standards to apply. See 5 U.S.C. 559 (subsequent legislation does not supercede or modify the provisions of the APA "except to the extent that it does so expressly").

The background to the enactment of Section 925(c)'s judicial review provision reinforces that conclusion. Prior to the enactment of that provision, the Ninth Circuit held in *Kitchens* v. *Department of Treasury*, 535 F.2d 1197, 1199-1200 (1976), that an applicant for relief from firearms disabilities could obtain judicial review of the Secretary's denial of relief under the APA's arbitrary or capricious standard. The Ninth Circuit rejected the government's argument that the Secretary's decision was unreviewable. *Ibid.* By enacting the judicial review provision in Section 925(c), Congress codified the holding in *Kitchens* that the Secretary's denial of relief is subject to review under the APA, and foreclosed the government from arguing in the future that such a decision is unreviewable.

Respondent argues (Br. 47) that APA standards do not apply under Section 925(c) because a sentence from a prior version of the bill that expressly incorporated APA standards into Section 925(c) was omitted from the law as finally enacted. Because APA standards apply of their own force to statutory review provisions, however, that sentence was superfluous. A decision to eliminate that redundancy fully justifies that deletion. Respondent's alternative explanation attributes to Congress an intent to displace otherwise applicable APA standards without substituting any alternative standard of review at all. Congress did not act in such an inexplicable manner. Instead, in Section 925(c), Congress specified the procedure for obtaining judicial review of denials of relief, and allowed the existing standards in the APA to govern the scope of that review.[3]

2. Respondent argues (Br. 49) that, if APA standards do apply, the Secretary's failure to act on applications for relief from firearms disabilities violates several of those standards. In particular, he contends that the Secretary's failure to act on his application was "short of statutory right," and either "unsupported by substantial evidence" or "unwarranted by the facts." *Ibid.* (quoting 5 U.S.C. 706(2)(C), (E), and (F)). The Secretary's failure to act did not violate those standards.

Even before the enactment of the appropriations bar, Section 925(c) did not confer any rights on convicted felons. It granted authority to the Secretary to award relief from firearms disabilities as a matter of discretion. Nor do convicted felons now have a right to have the Secretary act on their applications for relief. To the contrary, in light of the appropriations bar, the Secretary has a statutory obligation *not* to do so.

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[3] Respondent does not argue that a district court's authority under Section 925(c) to "admit additional evidence where failure to do so would result in a miscarriage of justice" displaces APA standards of review, and any such argument would be insubstantial. The authority to "admit additional evidence" does not address the standards for reviewing administrative action once the evidence is admitted. In the rare case in which the admission of additional evidence would be justified, Congress contemplated that a court would permit the Secretary to reconsider his decision in light of the new evidence, and then review the Secretary's decision on reconsideration under the ususal standards. S. Rep. No. 583, 98th Cong., 2d Sess. 27 (1984). In that respect, Section 925(c) tracks other statutes that authorize a party to offer new evidence after administrative action has been taken. See 28 U.S.C. 2347(c); 42 U.S.C. 405(g) (sentence six) (discussed in *Sullivan* v. *Finkelstein*, 496 U.S. 617, 625-626 (1990)).

Moreover, neither the "substantial evidence" standard nor the "unwarranted by the facts" standard is applicable to review under Section 925(c). The "substantial evidence" standard applies when a hearing is required by statute, 5 U.S.C. 706(2)(E), and Section 925(c) contains no such requirement. The "unwarranted by the facts" standard applies when a statute requires a trial de novo, 5 U.S.C. 706(2)(F), and Section 925(c) does not require such a trial. In any event, in light of the appropriations bar, the Secretary's failure to act on respondent's application was both supported by substantial evidence and warranted by the only material facts—that respondent applied to the Secretary for relief from firearms disabilities at a time when the appropriations bar precluded the Secretary from acting on his application.

E. Judicial Authority To Grant Relief From Firearms Disabilities Would Undercut The Purposes Of The Appropriations Bar

1. The assumption of judicial authority to relieve convicted felons of their firearms disabilities would also defeat the purposes of the appropriations bar. As previously noted, Congress enacted that bar in order to protect the public from potentially dangerous convicted felons and to devote scarce federal resources to the prosecution of crime. U.S. Opening Br. 4, 12-13 & n.5. Judicial consideration of applications for relief under Section 925(c) would undercut those purposes.[4]

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[4] Respondent contends (Br. 39-40) that it is impermissible to rely on legislative history to determine the purposes of an appropriations law, that the legislative history of the appropriations bar is contradictory (*id.* at 42), and that the legislative history is irrelevant because it concerns appropriations bars from earlier years (*id.* at 40). Those objections are all without merit. In the first place, the text of the appropriations bar makes clear Congress's intent not to have resources directed to relieving firearms disabilities. Legislative history is also relevant in determining the purposes of an appropriations law. See *United States* v. *Will*, 449 U.S. 200, 222 & n.24 (1980); *United States* v. *Dickerson*, 310 U.S. 554, 561-562 (1940). All of the relevant legislative history identifies the same two reasons for the appropriations bar. See U.S. Opening Br. 4, 12-13 & n.5. And respondent offers no reason to believe that later appropriations bars using the exact same language as earlier ones were intended to achieve different purposes. See *Pierce* v. *Underwood*, 487 U.S. 552, 567 (1988).

Respondent contends (Br. 28-29) that such a judicial role does not pose the same risk to public safety that prompted the appropriations bar. In fact, however, judicial consideration of applications for relief would pose an even greater danger. While ATF made its decisions on applications for relief after conducting a thorough impartial investigation, a court must rely on the parties to present relevant evidence. Because the appropriations bar precludes ATF from conducting an investigation into an applicant's background or the circumstances surrounding his conviction, a court would have to make its decision based largely on the applicant's one-sided presentation. The risks of erroneous fact-finding from such a process are apparent.[5]

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[5] While respondent asserts (Br. 30) that the evidence establishes that he satisfied the statutory preconditions for relief, that evidence consists largely of evidence that he presented. Because of the appropriations bar, ATF could not investigate either the circumstances of respondent's conviction or his background. Even so, respondent's description of the evidence is incomplete. For example, respondent fails to mention that he fired his Mexican attorney and hired a Mexican accountant to help him circumvent Mexico's criminal justice system. J.A. 51-52. Moreover, when respondent applied to the Secretary for relief, and when the district court issued its decision, respondent was disabled from possessing firearms under state law, and he had not yet been discharged from supervised release for at least two years. Gov't C.A. Reply Br. 5-8. Respondent therefore did not qualify for relief under the Secretary's regulations. See 27 C.F.R. 178.144(d). In addition, the court of appeals' finding (Pet. App. 11a; *id.* at 5a n.9), relied on by respondent (Br. 30), that respondent's inability to possess firearms prevents him from pursuing his livelihood is misleading. While respondent had a licence to sell firearms before his felony conviction, he earned his livelihood as a used car salesman both before and after his conviction. J.A. 11, 20, 24, 30-31, 39. Respondent

Respondent similarly errs in contending (Br. 27) that, because a court could require an applicant to bear the costs of additional investigation, a judicial remedy would address Congress's concern that government resources are better spent on fighting crime than on processing applications for relief. That approach would not eliminate the flaw of a one-sided investigation, because it would not enable ATF to conduct its *own* investigation on behalf of the government. The approach also would still require the court, ATF officials, and government attorneys to expend scarce resources responding on the merits to applications for relief from firearms disabilities.

2. Respondent argues (Br. 23-24) that Congress's failure to enact bills that would have repealed Section 925(c) shows that Congress did not intend to affect that program through the appropriations bar. Failed legislative proposals, however, provide an inherently unreliable basis for discerning Congress's intent. *Solid Waste Agency of N. Cook County* v. *Army Corps of Engineers*, 531 U.S. 159, 170 (2001). The inference respondent seeks to draw is especially unwarranted. As respondent acknowledges (Br. 41 (citation omitted)), there is a fundamental difference between an appropriations bar and a permanent repeal of legislation: an appropriations bar "forces Congress to revisit the issue each year as part of the annual appropriations process." Congress's failure to enact a permanent repeal of the program for relieving convicted felons of their firearms disabilities is perfectly consistent with Congress's decision to suspend that program one year at a time, leaving its future fate to be decided in the next year's appropriation.

Respondent's reliance (Br. 24) on Congress's failure to enact an amendment to the appropriations bar that would have foreclosed judicial review is also misplaced. Congress

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indicated in his testimony that he sought relief from firearms disabilities so that he would be able to hunt. J.A. 51.

easily could have viewed such an amendment as unnecessary because Section 925(c) does not authorize review of a failure to act, and the APA adequately protects an agency decision made in accordance with law. In any event, Congress's *failure* to enact legislation foreclosing judicial *review* cannot possibly establish that Congress *enacted* legislation affirmatively authorizing courts for the first time to determine *independently* that an applicant is eligible for relief and warrants a favorable exercise of discretion, and to award that relief.

3. Respondent also argues (Br. 44-45) that judicial consideration of applications for relief is consistent with Congress's failure to repeal a provision that permits States to relieve convicted felons of their firearms disabilities when those disabilities stem from state law convictions. See 18 U.S.C. 921(a)(20). But Congress's respect for the States' traditional role in protecting the public from the dangers associated with firearms does not suggest that Congress intended to transfer responsibility for administration of the federal relief program from ATF to the federal courts. See S. Rep. No. 106, 103d Cong., 1st Sess. 20 (1993) (noting that "[u]nder current policy, States have authority to make these determinations, and the Committee believes that this is where the responsibility ought to rest").

F. Respondent's Reliance On Rules Of Construction Is Misplaced

In support of his contention that courts have authority to award relief from firearms disabilities, respondent invokes several canons of statutory construction. Those canons have no application here.

1. Respondent first argues (Br. 16-19) that the government has failed to substantiate its claim that the appropriations bar has impliedly repealed the Secretary's and the courts' authority to award relief from firearms disabilities. The government's position in this case, however, does not

depend on a theory of an implied repeal. The appropriations bar *suspends* the Secretary's ability to act on applications for relief one year at a time; it does not *repeal* it. Moreover, there is noting implied about that suspension. The appropriations bar *expressly* prohibits the use of any funds "to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." 115 Stat. 519.

Nor has the government argued that the appropriations bar repeals any provision for judicial review. The appropriations bar leaves both the specific provision for judicial review under Section 925(c) and the general provisions of the APA unaffected. To be sure, respondent may not obtain relief from firearms disabilities under either Section 925(c) or the APA. That is because (1) a court has never had authority under Section 925(c) to determine independently that an applicant satisfies the statutory preconditions and warrants relief as a matter of discretion, or to award relief itself, see pp. 5-7, *supra*; (2) a court has never had authority under Section 925(c) to review a Secretary's failure to act on applications, see pp. 7-11, *supra*; (3) even if Section 925(c) did confer that authority, a court would be required to sustain the Secretary's failure to act because it is compelled by the appropriations bar, see pp. 11-14, *supra*; and (4) a suit under the APA would fail for the same reason. See pp. 9-10. The fact that a suit to obtain relief from firearms disabilities would fail on the merits, however, does not mean that there has been a repeal of the statutes authorizing judicial review.

2. The principle that "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress," Resp. Br. 20 (quoting *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996)), is also inapposite here. The district courts remain free to exercise all of the jurisdiction they have. They are only authorized by Section 925(c) to "review" the Secretary's action, and because the Secretary is

not authorized to grant relief from firearms disabilities, there is no basis for a court to do so on judicial review.

3. Similarly unpersuasive is respondent's reliance (Br. 20-21) on the rule of lenity, which respondent describes as requiring doubts to be resolved "in favor of the defendant." Respondent is not a defendant; he is a plaintiff seeking an exercise of discretion to remove a clear consequence of his felony conviction. See 18 U.S.C. 922(g)(1). In any event, the rule of lenity applies only when, "after seizing everything from which aid can be derived," a court "can make 'no more than a guess as to what Congress intended.'" *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998); see also *Lewis* v. *United States*, 445 U.S. 55, 65 (1980). (noting that the "touchstone" of the rule of lenity "is statutory ambiguity"). Here, the appropriations bar unambiguously prevents ATF from granting relief, and the courts do not have independent authority to do so.

4. Finally, the principle that Acts of Congress should be interpreted to avoid difficult constitutional issues (Resp. Br. 21-21) is inapplicable here.[6] That principle applies only when Congress has not made its intent clear. *Miller* v. *French*, 530 U.S. 327, 341 (2000); *Lewis*, 445 U.S. at 65. Here, Congress has made clear that a court does not have authority under Section 925(c) to determine de novo whether the preconditions for relief have been satisfied or to award relief itself.

Moreover, a court's inability to perform that role does not raise any serious constitutional question. This Court has already rejected a constitutional challenge to the firearms bar for convicted felons in the predecessor to 18 U.S.C. 922(g). *Lewis*, 445 U.S. at 65 n.8. Respondent invokes the reasoning of the Fifth Circuit in *United States* v. *Emerson*,

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[6] Respondent did not raise any Second Amendment objection to the appropriations bar in the court of appeals or in his brief in opposition in this Court.

270 F.3d 203, 261 (2001), cert. denied, 122 S. Ct. 2362 (2002), that "the Second Amendment *does* protect individual rights." While the United States agrees that the Second Amendment protects individual rights, see Br. in Opp. at 19-20 n.3, *Emerson*, *supra* (No. 01-8780), that does not affect the constitutionality of either the firearms disability for felons or the appropriations bar. As the Fifth Circuit explained, the Second Amendment does not protect persons convicted of a felony. *Emerson*, 270 F.3d at 261 ("it is clear that felons * * * may be prohibited from possessing firearms"); *id.* at 226 n.21 (citing evidence that, at the time of the framing of the Second Amendment, the right to bear arms did not extend to convicted felons).

* * * * *

For the foregoing reasons, as well as those stated in the government's opening brief, the judgment of the court of appeals should be reversed, and the case should be remanded for consideration of any other claim that legitimately remains in the case.[7]

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JULY 2002

[7] Respondent urges (Br. 50 n.23) a remand for a determination whether his foreign conviction subjects him to disabilities. On remand, however, the court of appeals must first decide whether it has jurisdiction to reach that issue, and if so, whether respondent has adequately preserved that claim. See Gov't Reply Br. Pet. Stage 3-5.

APPENDIX

STATUTORY PROVISIONS INVOLVED

1. 5 U.S.C. 551(13) provides in pertinent part:

Definitions

* * * * *

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act;

* * * * *

2. 5 U.S.C. 704 provides in pertinent part:

Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

3. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Supreme Court, U.S.
FILED
APR 8 2002

(4)

No. 01-704

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

THOMAS LAMAR BEAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF VIOLENCE POLICY CENTER AS AMICUS CURIAE SUPPORTING PETITIONER

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S. Rep. No. 103-106 (1993) 26
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139 Cong. Rec. S10848 (daily ed. Aug. 6, 1993) 27
142 Cong. Rec. S12164 (daily ed. Oct. 2, 1996) 25

OTHER AUTHORITIES

$4 Million a Year To Rearm Felons, Wash. Post, Nov. 27, 1991, at A16 27
Nelson, Ryan Laurence, *Rearming Felons, Federal Jurisdiction under 18 USC § 925(c)*, 2001 U. Chi. Legal F. 551 16
Violence Policy Center, *Guns for Felons: How the NRA Works to Rearm Criminals* (Mar. 2000), *available at* http: // www.vpc.org / studies / felons.htm 7, 8
Violence Policy Center, *Putting Guns Back Into Criminals' Hands: 100 Case Studies of Felons Granted Relief From Disability Under Federal Firearms Laws* (1992), *available at* http://www.vpc.org/studies/reliefcont.htm 2, 3, 4, 5, 28

IN THE

Supreme Court of the United States

No. 01-704

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

THOMAS LAMAR BEAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF VIOLENCE POLICY CENTER AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF AMICUS[1]

The Violence Policy Center ("VPC") is a national non-profit organization working to reduce firearms violence through research, education, and advocacy. As the Court of Appeals below expressly noted, VPC's groundbreaking 1992 study of felons whose privileges to possess firearms were restored, VPC, *Putting Guns Back Into Criminals' Hands:*

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[1] Counsel for amicus curiae authored this brief in its entirety. No person or entity other than amicus curiae, its members, and its counsel made a monetary contribution to the preparation or submission of the brief. The written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

100 Case Studies of Felons Granted Relief From Disability Under Federal Firearms Laws (1992) ("VPC Report"),[2] spurred Congress into action, leading to the enactment and re-enactment of annual appropriations measures prohibiting the use of funds for the purpose of restoring any felon's opportunity to possess a firearm. (Pet. App. 5a.)

The Violence Policy Center is at the forefront of organizations working to reduce firearms violence in our nation. To this end, VPC analyzes a wide range of current firearm issues and provides information to policymakers, journalists, scholars, public health professionals, grassroots advocates, and members of the general public. Since its founding in 1988, VPC has released more than 60 studies and books which have helped shape firearms legislation and policy on the federal, state, and local levels while increasing public understanding of firearms violence as a public health issue. In addition, VPC's Litigation Project, established in 2001, has filed amicus curiae briefs in precedent-setting cases in the federal and state trial and appellate courts. As a result of its unique expertise, VPC is often relied on and cited by national news outlets and other organizations. Its staff, which includes lawyers and health policy analysts, are nationally recognized experts on firearms violence, firearms manufacture, federal firearms law and the agencies empowered to enforce such laws (such as the Department of Justice and the Bureau of Alcohol, Tobacco and Firearms), and firearms litigation. VPC respectfully submits this brief in support of Petitioner the United States, urging reversal of the decision of the Court of Appeals.

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[2] The VPC Report appears on the Violence Policy Center's Web site at http://www.vpc.org/studies/reliefcont.htm. The three parts of the study appear without pagination at the following URLs:

http://www.vpc.org/studies/reliefone.htm ("Link 1");
http://www.vpc.org/studies/reliefwo.htm ("Link 2");
http://www.vpc.org/studies/reliefthree.htm ("Link 3").

STATUTORY AND FACTUAL BACKGROUND

Federal law prohibits felons from possessing, transporting, or shipping firearms or ammunition. 18 U.S.C. § 922(g)(1). This proscription dates to the 1938 Federal Firearms Act, which barred receipt of firearms by individuals convicted of a "crime of violence." Pub. L. No. 75-785, 52 Stat. 1250. Over the decades that followed, Congress expanded that prohibition until it encompassed virtually all crimes, including non-violent offenses, "punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1).[3]

Congress amended the 1938 Federal Firearms Act in 1965 to permit convicted felons to petition the Secretary of the Treasury for relief from the prohibition set forth in Section 922(g)(1). Accordingly, a convicted felon could apply to the Secretary of the Treasury to restore the ability to possess a firearm upon a showing that the felon "will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. § 925(c). This provision was enacted after Olin Mathieson Corporation had been convicted of felony counts pertaining to an overseas kickback scheme. *See* VPC Report at Link 1; *United States v. Olin Mathieson Chem. Corp.*, 368 F.2d 525 (2d Cir. 1966) (per curiam) (upholding conviction). Because strict application of the statu-

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[3] *See* Act of Mar. 10, 1947, Pub. L. No. 80-14, 61 Stat. 11 (adding burglary, house breaking, and assault); Act of Oct. 3, 1961, Pub. L. No. 87-342, 75 Stat. 757 (adding the language currently in Section 922(g)(1)); Gun Control Act of 1968, Pub. L. No. 90-616, 82 Stat. 1212.

The statute still exempts certain white-collar offenses. *See* 18 U.S.C. § 921(a)(20)(A) ("The term 'crime punishable by imprisonment for a term exceeding one year' does not include—(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices.").

tory prohibition would have driven Winchester—a gun and ammunition manufacturer that was an Olin Mathieson subsidiary, *see* VPC Report at Link 1—out of business, Congress granted the Secretary of the Treasury discretionary authority to make exceptions in appropriate cases. The Secretary of the Treasury subsequently delegated authority to the Director of the Bureau of Alcohol, Tobacco, and Firearms ("ATF") to grant or deny such applications after an investigation. *See* 27 C.F.R. § 178.144(b) & (d).

In 1986, Congress passed the McClure-Volkmer Act. *See* Pub. L. No. 99-308, 100 Stat. 449. This Act amended Section 925(c) to permit felons who had been convicted of crimes involving a firearm, had been committed involuntarily to a mental institution, or had violated the Gun Control Act of 1968 to petition ATF for restoration of their firearms privileges. *See id.* § 105, 100 Stat. 449, 459; *see also Stop Arming Felons Act: Hearing on S.2304 Before the Subcomm. on the Constitution Before the Senate Comm. on the Judiciary*, 101st Cong. 42 (1992) (testimony of Josh Sugarmann, Executive Director of Violence Policy Center) ("Sugarmann testimony") (noting that the McLure-Volkmer Act had been drafted by the National Rifle Association).

From 1985 until 1991, ATF maintained approximately forty full-time staff members to review Section 925(c) applications and spent in excess of $21 million conducting more than 22,000 investigations. VPC Report at Link 1. ATF's investigations were "comprehensive": agents conducted a preinvestigation interview of the applicant; researched the applicant's conviction, employment history, law enforcement record, and mental competency; and interviewed "regional law enforcement agencies, neighbors, friends, business associates, and arresting and probation officers." *Id.* The statute makes plain that the decision to grant a Section 925(c) application rests in sound discretion of the Secretary. *See* 18 U.S.C. § 925(c) ("[T]he Secretary may grant such relief if it is established to his satisfaction . . . ."); 27 C.F.R.

§ 178.144(d) ("The Director may grant relief to an applicant if it is established to the satisfaction of the Director . . . .").

Congress provided for circumscribed judicial review limited to denials of applications: "Any person whose application for relief from disabilities is *denied* by the Secretary may file a petition with the United States district court for . . . a judicial review of such denial." 18 U.S.C. § 925(c) (emphasis added). This judicial review, pursuant to the Administrative Procedures Act, is limited to determining whether the agency action was "arbitrary and capricious." 5 U.S.C. § 706(2)(A).

The Violence Policy Center first focused on ATF's "relief" for felons program after it became aware that Alan Gottlieb, the Chairman of the Citizens Committee for the Right to Keep and Bear Arms, a gun rights organization, regained firearms privileges in 1989, after having been convicted of tax evasion in 1984. *See* Sugarmann Testimony, *supra*, at 42. VPC commenced an investigation, expecting to find a selective program granting "relief" to a few felons, most of whom had committed white collar crimes. *See id.* Instead, VPC discovered that ATF had restored the firearms privileges of thousands of felons, whose crimes included sexual assault, drug dealing, terrorism, homicide, and armed robbery. *See id.* at 42-43.

In May 1992, VPC released a landmark report, entitled *Putting Guns Back Into Criminals' Hands: 100 Case Studies of Felons Granted Relief from Disability Under Federal Firearms Laws*, that detailed its investigation of the Section 925(c) "relief" program. The VPC Report revealed that, between 1982 and 1992, ATF had granted approximately one third of the more than 22,000 applications it processed. VPC Report at Link 1. Moreover, ATF had increased its annual expenditures on Section 925(c) investigations from $2.7 million in 1985 to $4.2 million in 1991. *Id.*

Disturbingly, the VPC Report found that ATF granted applications to restore gun privileges to several individuals despite strong evidence obtained in ATF investigations suggesting that such individuals might use firearms to threaten others:

- Jon Wayne Young, 19, had a six-year history of sex-related offenses when he pled guilty to aggravated assault and aggravated robbery in 1976. The sentencing judge stated: "You don't have enough control of your actions to prevent [yourself from killing someone.] It is just lucky, fortunate, that the girl wasn't killed, and the reason probably that she wasn't killed is that she submitted to you but had she fought you undoubtedly she might have been killed, probably would have been killed." ATF restored Young's gun privileges in 1989. *See id.*

- Jerome Sanford Brower conspired with former CIA agents Edwin Wilson and Francis Terpil to supply explosives to a terrorist training program in Libya. In 1981, Brower pled guilty to violations of the Arms Export Control Act and unlawfully transporting hazardous material in foreign commerce. After receiving a four-month prison sentence and a $5,000 fine, Brower applied for restoration of his gun privileges in 1985. ATF granted his request. *See id.*

Moreover, even in cases involving firearms-related offenses, ATF granted these applications:

- One unnamed applicant omitted two convictions—one for burglary and another for brandishing a firearm—from his Section 925(c) application because he "couldn't remember the exact dates." ATF granted the application. *See id.* at Link 3.

- Bobbie Sherrell Holaway had a laundry list of convictions, including dealing in explosives and carrying a firearm without a license. ATF granted the application. *Id.*

- Sherman Dale Williams was a convicted felon who had illegally transferred machine guns. His neighbors described him as having "a reputation as a crook" and stated that "if he were allowed to own firearms," they hoped that he would use them "somewhere else and not in [their] neighborhood." The investigating agent concluded that "[d]uring this investigation, the law enforcement community and a few neighbors expressed great concern [regarding Williams'] being granted relief, however, no documentable reasons for denying him his relief were produced. Because of this lack of documentation, I have no choice but to recommend that [he be] granted relief." *Id.*

With this pattern of granting relief, the VPC Report unsurprisingly found that many felons whose firearm privileges were restored under Section 925(c) used those firearms to commit further crimes, including many violent crimes. This was true even where the underlying crime resulting in the loss of firearms privileges was not a violent one. *See* VPC Report at 13 ("The severity of the original crimes compared with subsequent crimes committed effectively illustrates the futility in attempting to predict future criminal behavior based on a felon's criminal past."); *see also* VPC, *Guns for Felons: How the NRA Works to Rearm Criminals* 9 (Mar. 2000), *available at* http://www.vpc.org/studies/felons.htm ("VPC 2000 Report") (citing instances where individuals, having lost their privileges upon conviction for non-violent crimes, had those privileges restored and then committed firearms-related offenses). As VPC demonstrated in a subsequent report, 69 felons granted "relief" between 1985 and 1992 were rearrested thereafter for crimes ranging from trafficking in controlled substances and possession of illegal weapons to sexual assault, abduction-kidnapping, child mo-

lestation, and domestic abuse. *See* VPC 2000 Report (documenting recidivism among felons granted Section 925(c) "relief").

Congress's response to the VPC Report was swift and decisive: Congress defunded the Section 925(c) "relief" program, expressly eliminating the previous broad discretionary authority granted to the Secretary to grant this "relief." The 1992 appropriations law stated that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)."[4]

Subsequent appropriations bills have permitted ATF to process applications filed on behalf of corporations, the entities originally intended to benefit from Section 925(c) "relief."[5] But Congress's determination that individuals convicted of felonies should not be permitted under federal law to possess, transport, or ship firearms or ammunition has been validly enacted into law each year since 1992.

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4 Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1993).

5 *See* Treasury and General Government Appropriations Act, Pub. L. No. 107-67, 115 Stat. 514, 519 (2002) ("Provided further, That such funds shall be available to investigate and act upon applications filed by corporations for relief from Federal firearms disabilities under 18 U.S.C. section 925(c)"); Consolidated Appropriations Act, Pub. L. No. 106-554, 114 Stat. 2763 (2001); Treasury and General Government Appropriations Act, Pub. L. No. 105-61, 111 Stat. 1277 (1998); Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009 (1997); Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 104-52, 109 Stat. 471 (1996); Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 103-329, 108 Stat. 2385 (1995); Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 103-123, 107 Stat. 1228 (1994).

Despite this clear statutory statement of congressional intent, the Court of Appeals nevertheless held that district courts retained authority to "review" the Secretary's inability to act. Moreover, the Court of Appeals held that district courts, upon such judicial "review," could directly grant relief to convicted felons, restoring their firearms privileges under Section 925(c).

SUMMARY OF ARGUMENT

Every annual appropriations law for the Department of the Treasury since 1992—the year in which VPC published its report—has provided that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." *See supra* at 8 n.5.

The Court of Appeals misconstrued this language and ignored Congress's unambiguous intent behind it. The Court of Appeals itself correctly concluded that Congress in fact intended to "abrogate" the right to seek both "administrative *and* judicial" relief from the firearms disability (Pet. App. 9a.) (emphasis added). The Court of Appeals then erroneously applied a form of heightened scrutiny to the appropriations legislation and required Congress to be more "direct and definite" to accomplish its objective in an appropriations provision. (*Id.*) The Court of Appeals should not have imposed this additional requirement. Once a court has determined Congress's intent, there is no basis—indeed, no authority—for the court to prefer (much less demand) one form of legislation over another. "So long as the method chosen by Congress is constitutional, then it matters not that alternative methods exist" to achieve the same end. *United States v. Villamonte-Marquez*, 462 U.S. 579, 591 n.5 (1983).

The text, structure, and legislative history of the appropriations laws all confirm that the Court of Appeals should not have overridden Congress's unambiguous intent to suspend the restoration of firearms privileges under Section

925(c). As a textual matter, the statute only grants courts jurisdiction over the "denial" of a petition, and ATF ceased "den[ying]" petitions when Congress forbade it from "acting upon" them. Structurally, the narrow judicial review envisioned by Section 925(c) cannot sensibly occur without the predicate administrative investigation and determination by ATF, which Congress has prohibited. Finally, the legislative record confirms that by defunding any ATF action on Section 925(c) petitions, Congress intended to preclude the courts from acting on such petitions.

VPC encourages the Court to adopt the conclusion of the Third Circuit in *Pontarelli v. ATF*, No. 00-1268, 2002 U.S. App. LEXIS 5309 (Mar. 29, 2002). There, the court, sitting en banc, overruled its own prior circuit precedent, and, in a comprehensive opinion on the issues, sided with all of its sister circuits (except the Fifth). That Court aptly summarized the essential flaws of the Fifth Circuit's view:

> We decline to follow *Bean* because . . . it ignored the texts of § 925(c) and the appropriations ban, departed from Supreme Court precedent on when an appropriations act can change a substantive statute and distorted the legislative history of the appropriations ban.

Id. at *5 n. 4.

ARGUMENT

I. CONGRESS CAN—AND DID—VALIDLY AND REPEATEDLY SUSPEND THE OPERATION OF SECTION 925(c) THROUGH APPROPRIATIONS LEGISLATION.

This Court has repeatedly held that Congress may alter statutes through appropriations legislation. *See, e.g., Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992). Yet in disregarding Congress's clear expressed intent to suspend the operation of Section 925(c), the Court of Appeals relied heavily on the principle that repeals by "implication" are disfavored, particularly where the "repeal" is to be implied from appropriations legislation. (Pet. App. 7a.) That principle does not apply here. This case does not involve any "implicit" repeal of Section 925(c). Rather, the relevant appropriations provisions have *expressly* suspended ATF's power to act. As a result, there is no "denial" of a petition, and therefore no predicate for judicial review.

"[W]hen Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt that . . . it [may] accomplish its purpose by an amendment to an appropriation bill, or otherwise.'" *United States v. Will*, 449 U.S. 200, 222 (1980) (quoting *United States v. Dickerson*, 310 U.S. 554, 555 (1940)) (omission and second brackets in original). In such situations, courts will not presume that a provision enacted as part of an appropriations statute "amend[s] substantive law," unless Congress said so "clearly." *Robertson*, 503 U.S. at 440. But where Congress makes its intention clear, the judicial task is complete. "So long as the method chosen by Congress is constitutional, then it matters not that alternative methods exist" to achieve the same end. *United States v. Villamonte-Marquez*, 462 U.S. 579, 591 n.5 (1983); *see also Dickerson*, 310 U.S. at 561 (noting that Congress's preference of one legislative formulation over another is "not an

infallible guide to legislative intent, and cannot overcome more persuasive evidence where, as here, it exists").

The practice of using appropriations legislation to enact substantive law is longstanding. *See, e.g.*, *Robertson*, 503 U.S. 429 (holding that Congress altered certain environmental laws through subsequent appropriations legislation); *Dickerson*, 310 U.S. 554 (holding that Congress reduced reenlistment allowances through appropriations legislation); *United States v. Mitchell*, 109 U.S. 146 (1883) (holding that Congress reduced salaries for Indian interpreters in appropriations legislation); *see also Will*, 449 U.S. 200 (upholding Congress's power not to give judges a cost-of-living adjustment prior to the COLA taking effect). Congress also routinely restricts the use of federal funds in connection with appropriations legislation. For example, the Hyde Amendment, enacted every year since 1976, bars the use of funds appropriated under the Medicaid Act for abortions except in limited circumstances. *See, e.g.*, *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 475-77 (1996) (per curiam) (discussing Hyde Amendment).

Congress's suspension of Section 925(c) is another example of this common and unobjectionable practice. It cannot be doubted that Congress has spoken clearly to the point at issue here. Each year for the past decade, Congress has approved and the President has signed legislation stating that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. § 925(c)." In the face of this unambiguous statement, it is unsurprising that even the Court of Appeals agreed that Congress can and has prevented action by ATF. (Pet. App. 9a.) The only question, therefore, is whether the statute reflects a congressional intent to authorize district courts to rule on Section 925(c) applications without the benefit of a prior administrative determination.

In holding that Congress had not precluded the availability of judicial review of the "denial" of a Section 925(c) petition, the Court of Appeals relied heavily on the principle that repeals by implication are disfavored (*see* Pet. App. 7a (citing *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978))), "especially" when the repeal is "implied" from an appropriations law. *See also Robertson*, 503 U.S. at 440 ("[R]epeals by implication are especially disfavored in the appropriations context.").

The Court of Appeals failed to appreciate, however, that at bottom the judicial task, as in *Hill*, is limited to discerning Congress's intent. In *Hill*, this Court was appropriately skeptical of the notion that an intent to repeal a statute could be discerned from a decision to fund a project that arguably conflicted with that statute. This Court therefore found, as a matter of statutory construction, that a repeal of substantive law would not lightly be inferred from an appropriations provision:

> When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute *which might prohibit the expenditure*.

437 U.S. at 190 (emphasis added). In other words, Congress should not be presumed to have intended to repeal a prior law simply by funding a project that may conflict with it.

In this case, however, there is no such ambiguity as to Congress's intent to suspend Section 925(c). Unlike an outright repeal of the legislation, *see Robertson*, 503 U.S. at 440, suspension of the legislation in the appropriations bill (as in this case) effectively forces Congress to revisit the issue each year as part of the annual appropriations process. *See Meek*

v. Pittenger, 421 U.S. 349, 372 (1975) (noting that "[t]he recurrent nature of the appropriation process guarantees annual reconsideration" of legislation), *overruled on other grounds by Mitchell v. Helms*, 530 U.S. 793 (2000). As a result, by having to revisit the issue annually during the appropriations process, Congress can speak far more clearly than if it were to act on a single occasion. *Cf. Robertson*, 503 U.S. at 440 (amendment through single act); *Barnhart v. Walton*, No. 00-1937, slip op. at 7-8 (U.S. Mar. 27, 2002) (finding that Congress intended interpretation of law where Congress frequently amended bill but left agency's longstanding interpretation undisturbed). Congress's consistent use of the same language in each appropriations measure only reinforces Congress's clear intent. *Cf. Dickerson*, 310 U.S. at 561-62 (finding that Congress spoke sufficiently clearly in suspending legislation through appropriations process even where legislative language differed across different years' appropriations laws).[6]

The Court of Appeals failed to respect Congress's conscious legislative choice. Inexplicably repudiating its prior panel decision and upholding the district court's decision, the panel in this case held that Congress had not spoken with sufficient clarity to suspend operation of the judicial review provision of Section 925(c). As Part II demonstrates, the text and structure of Section 925 made it obvious that by suspending ATF's power to act, Congress had mooted the judicial review provision.

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[6] In light of this repeated congressional action, it cannot plausibly be maintained that the passage of time supported the Court of Appeals decision to reverse its own precedent and reinstate the judicial review of Section 925(c) petitions. *See Bean v. ATF*, 253 F.3d 234, 237 (5th Cir. 2001).

II. CONGRESS'S SUSPENSION OF ATF'S POWER PREVENTS ACTION BY THE DISTRICT COURTS.

The Court of Appeals held that although the appropriations provision disabled ATF from acting on a petition, judicial review of the "denial" was nevertheless available under Section 925(c). The implicit conclusion from this holding is that Congress would intend for judicial review to be available, in the absence of any prior administrative determination. That conclusion is unsupportable. To the contrary, the statutory structure makes clear that the provisions for judicial review cannot sensibly have meaning before an investigation by the Secretary and a denial of the petition.

A. Congress Stripped the District Courts of Jurisdiction.

It is axiomatic that federal courts possess only that jurisdiction the Constitution permits and statutes provide. *See, e.g., Finley v. United States*, 490 U.S. 545, 547-48 (1989). Congress is not obligated to grant district courts the power to review agency decisions, and district courts may only hear such appeals to the extent of a jurisdictional grant. *See, e.g., Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 672-73 (1986) (stating that while presumption exists in favor of judicial review of agency decisions, Congress can, subject to constitutional limits, override that presumption); *Califano v. Sanders*, 430 U.S. 99, 108-09 (1977) (holding that absent constitutional challenge federal courts lack jurisdiction to review final decision refusing to reopen a claim for social security benefits).

Section 925(c) provides that "any person whose application for relief from disabilities is *denied* by the [ATF] may file a petition with the United States district court for the district in which he resides for a judicial *review of such denial*." 18 U.S.C. § 925(c) (emphasis added). This language makes clear that before the courts can act, ATF must *deny* a per-

son's application. As several federal appeals courts have concluded, this requirement is jurisdictional. *Saccacio v. ATF*, 211 F.3d 102, 104 (4th Cir. 2000) (Luttig, J.); *Owen v. Magaw*, 122 F.3d 1350, 1354 (10th Cir. 1999); *Burtch v. United States Dep't of Treasury*, 120 F.3d 1087, 1090 (9th Cir. 1997).

A "denial" is "'an adverse determination on the merits,' rather than merely 'a refusal to act.'" *Saccacio*, 211 F.3d at 104 (quoting *Burtch*, 120 F.3d at 1090); *see also McHugh v. Rubin*, 220 F.3d 53, 60-61 (2d Cir. 2000). Other aspects of Section 925(c) reinforce this definition. Section 925(c)'s statement permits district courts to "admit *additional* evidence where failure to do so would result in a miscarriage of justice." 18 U.S.C. § 925(c) (emphasis added). Because courts are limited to "review[ing] [a] denial," their power to admit "additional" evidence presupposes that *some* evidence must have been considered by the administrative agency. "If the district courts were intended, based upon the text of the statute, to make an initial determination independent of the Secretary, then presumably the statute would not provide for the admission of additional evidence and the standard by which to admit that evidence—namely, the evidence of a miscarriage of justice." Ryan Laurence Nelson, *Rearming Felons, Federal Jurisdiction under 18 USC § 925(c)*, 2001 U. Chi. Legal F. 551, 565. The notion that a district court might conduct the entire investigation on its own is therefore flatly inconsistent with this statutory scheme. In fact, since the funding restrictions were put into place, ATF has not admitted any evidence nor denied a single application. The predicate for judicial review—a denial of relief by ATF—is therefore necessarily absent. *See, e.g.*, *Pontarelli*, 2002 U.S. App. LEXIS 5309, at *24 ("This language unambiguously makes 'denial' a jurisdictional prerequisite.").

B. The Statutory Structure of Section 925(c) Supports the View that Congress Did Not Intend for Courts To Rule on Applications To Restore Firearm Privileges Absent a Prior Administrative Determination.

Where questions of statutory interpretation cannot be resolved on the basis of the plain language alone, this Court routinely consults the statutory structure. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). A statute's structure can clarify an ambiguity in its literal language. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992). Interpretations inconsistent with that structure and context should be rejected. *See, e.g.*, *FBI v. Abramson*, 456 U.S. 615, 625 (1982).

The statutory structure here makes plain that Congress accorded the Secretary of the Treasury broad discretion to determine whether to restore a felon's firearms privileges. That discretion was subject only to exceedingly narrow judicial review. Because the judicial role is entirely dependent on ATF's developing a factual record and reaching a judgment based thereon, it is common sense that Congress intended, by defunding ATF's role, to eliminate the availability of relief. Indeed, to believe that Congress intended the courts to review decisions—where no record exists and no decision was made—would ascribe complete irrationality to Congress.

Two specific aspects of the statute highlight the broad discretion granted to the Secretary of the Treasury (prior to Congress's decision to defund the program) and demonstrate the impossibility of "reviewing" the "denial" of a petition under Section 925(c) in the absence of a predicate determination. First, Section 925(c) vests the *Secretary* with the wide discretion to decide whether an applicant has satisfied the

statutory preconditions to a restoration of firearms privileges. Like many statutes, Section 925(c) lists a series of conditions that an applicant must satisfy before his privileges may be restored. *See* 18 U.S.C. § 925(c) (applicant not dangerous to public safety and restoration of rights not contrary to the public interest). But the statute does not automatically entitle an applicant to relief upon proof of these statutory criteria. To the contrary, the statute specifies that these preconditions must be established to the *Secretary's* satisfaction. *See id.* (providing that Secretary may restore rights if criteria are "established to *his* satisfaction") (emphasis added). When the Secretary—as directed by Congress—does not conduct an investigation into the satisfaction of the specified criteria, a court cannot meaningfully determine, on "reviewing" the denial, that the criteria are satisfied to the *Secretary's* satisfaction. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *Commissioner v. Engle*, 464 U.S. 206, 217 (1984) (courts should "find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested") (internal quotation marks and citation omitted).

Second, even when the statutory criteria have been established to the Secretary's satisfaction, Section 925(c) affords the Secretary of the Treasury an additional layer of discretion. In such cases, the statute does not compel the Secretary to restore the applicant's rights. Instead, the statute explicitly provides that the Secretary "may" restore these rights. 18 U.S.C. § 925(c). Again, this broad grant of discretion cannot be squared with a view of the statute that would permit judicial "review" in the absence of an administrative record or a determination by the Secretary. *See Pontarelli*, 2002 U.S. App. LEXIS 5309, at *25 ("That Congress gave the Secretary broad discretion to apply such an amorphous

standard suggests that it wanted an administrative agency, not district courts, to decide whether to restore felons' firearms privileges.") (internal quotation marks and citation omitted).

This Court's prior treatment of Section 925(c) respects Congress's carefully crafted scheme of administrative relief. This Court repeatedly has described Section 925(c) as creating a system of administrative remedies. *See Beecham v. United States*, 511 U.S. 368, 373 n* (1994) (describing Section 925(c) as allowing "*the Secretary of the Treasury* to grant relief from the disability imposed by § 922(g)"); *ATF v. Galioto*, 477 U.S. 556, 559 (1986) (noting that the newly enacted scheme permitted "*the Secretary* to grant relief"); *Lewis v. United States*, 445 U.S. 55, 57, 64 (1980) (repeatedly emphasizing that an aggrieved felon may apply to have his firearms privileges restored by obtaining "permission from *the Secretary of the Treasury*") (emphasis added in all quotations). *Galioto* characterized the process of seeking restoration of one's firearms privileges as an *administrative* process, explained that the statutory scheme "*permit*[*ted*] the Secretary to grant relief" and explicitly described the relief provided under Section 925(c) as an "administrative remedy." 477 U.S. at 559 (emphasis added).

Because the statute entitles applicants only to an "administrative remedy," judicial review of that determination is sharply restricted. A court reviewing the denial of a Section 925(c) application does not conduct a *de novo* hearing. Instead, the Administrative Procedure Act ("APA") governs any review. *See, e.g.*, *Mullis v. United States*, 230 F.3d 215, 219 (6th Cir. 2000) (collecting cases); *Bagdonas v. ATF*, 93 F.3d 422, 425 (7th Cir. 1996); *Bradley v. ATF*, 736 F.2d 1238, 1240 (8th Cir. 1984) (applying the APA to review denial of application to restore firearms privileges); *Kitchens v. ATF*, 535 F.2d 1197, 1199-1200 (9th Cir. 1976) (per curiam)

(same).[7] Under the APA's "narrow" standard of review, *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), the Secretary's denial of a petition may be reversed only if it is "arbitrary, capricious, an abuse of discretion or not otherwise in accordance with the law." 5 U.S.C. § 706. Administrative action fails that standard only where it is not supportable on any rational basis. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).[8]

Independent judicial rulings on Section 925(c) applications—such as that conducted by the District Court in this case and sanctioned by the Court of Appeals—are flatly inconsistent with the scheme of deferential "arbitrary and capricious" review envisioned by Congress. Where Congress has prohibited the Secretary of the Treasury from "investigat[ing]" or "act[ing] upon" Section 925(c) applications, the Secretary's refusal to rule on those applications could hardly be "arbitrary, capricious, an abuse of discretion or not otherwise in accordance with the law." Indeed, by refusing to "act on" an application to restore firearms privileges, the Director of ATF is acting in a manner "in accordance with the law."

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[7] Even prior to the enactment of the 1986 amendment adding the judicial review provision, courts reviewed the Secretary's determination under the Administrative Procedure Act. *See, e.g.*, *Kitchens*, 535 F.2d at 1199-1200. The 1986 judicial review provision merely redefined the standard under which the court could consider evidence outside the administrative record.

[8] Section 925(c) does permit the reviewing court to "admit additional evidence where failure to do so would result in a miscarriage of justice." Nonetheless, even after considering this additional evidence, the district court could only require that the Secretary (or ATF) reconsider its decision in light of the additional evidence. As the legislative history suggests, the Secretary of the Treasury would determine, in light of that evidence, whether to exercise discretion to grant relief from the proscription of Section 922(g). *See* S. Rep. No. 99-583, at 27 (1984); S. Rep. No. 97-476, at 24 (1982).

C. The Lower Court's Position Is Inconsistent With Two Separation-of-Powers Principles that Should Guide the Proper Interpretation of Section 925(c) and the Suspending Legislation.

In two key respects, the Court of Appeals wrongly arrogated to courts a traditionally executive function.

First, the Court of Appeals' implicit conclusion that a court can directly restore one's firearms privileges, rather than remand the matter back to the agency, blurs the line between the judicial and executive functions. Section 925(c) does not explicitly authorize a court to restore an applicant's firearms privileges. The statute by its terms limits the judicial role to "reviewing" the Secretary's denial of those applications. And while courts typically have broad equitable authority to grant proper relief, *see* 28 U.S.C. § 1651(a), direct judicial restoration of firearms privileges—rather than an order directing an executive branch official to do so—may well exceed its remedial power. This Court has long held that "review" under the APA's "arbitrary and capricious" standard merely entitles the court to vacate the Secretary's denial of relief and to remand the matter for further proceedings. *See, e.g.*, *State Farm*, 463 U.S. at 57 (finding agency action "arbitrary and capricious" and remanding case to lower court with directions to remand matter to agency). A court-ordered restoration of firearms privileges under this scheme flaunts that practice.

In this case, the relevant appropriations provisions bar ATF not only from conducting an "investigation" of a petition filed under Section 925(c), but more broadly from "acting" on any such petition. Presumably because that statutory prohibition would preclude ATF from restoring a felon's firearms privileges, even following review of a "denial," the Court of Appeals implicitly concluded that Congress authorized the court to restore these privileges directly. Because this construction of the statute would raise serious constitu-

tional difficulties on separation-of-powers grounds, it should not lightly be reached.

Second, the Court of Appeals' decision fails to recognize the respective branches' proper roles in investigating applications. Investigation, including the preliminary investigation of a felon's suitability to reacquire his firearms privileges, is a quintessentially executive function. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to . . . enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.") (collecting cases); *cf. Morrison v. Olson*, 487 U.S. 654, 706 (1988) ("Governmental investigation and prosecution of crimes is a quintessentially executive function."). Congress recognized the executive branch's unique ability to fulfill this role by vesting it with the power to investigate applications to restore firearms privileges. *See* 18 U.S.C. § 925(c) (providing that applications may be granted if the statutory criteria are established to the Secretary's satisfaction). Each of the appropriations laws prohibits the expenditure of funds for "investigat[ing]" applications to restore firearms privileges. As Congress was well aware when it decided whether to suspend the program, such investigations are difficult, sensitive, and fact-intensive processes requiring the expenditure of substantial time and resources to evaluate an applicant's suitability for restoration of his privileges. A typical investigation in connection with a Section 925(c) application involves extensive interviews with the applicant, character references, neighbors, employers and probation officers as well as accumulation of all evidence bearing on whether the applicant is likely to act in a manner dangerous to public safety and whether relief would be contrary to the public interest. *See generally Smith v. Brady*, 813 F. Supp. 1382, 1383-84 (E.D. Wis. 1993) (describing ATF's procedures when investigating Section 925(c) applications); *see also Pontarelli*, 2002 U.S. App. LEXIS 5309, at *44-45 ("Evaluating a § 925(c) application requires a detailed investigation of the felon's background and recent conduct. An effective investigation entails interviewing a wide array of people, including the felon, his family, his friends, the persons whom he lists as character references, members of the community where he lives, his current and former employers, his coworkers, and his former parole officers.") (citations omitted); VPC Report at Link 1.

In contrast to the executive branch, courts are poorly situated to conduct the investigations necessary to determine whether an applicant's privileges should be restored. "[I]n certain kinds of litigation practical considerations dictate a division of functions between court and agency under which the latter makes a preliminary, comprehensive investigation of all the facts, analyzes them, and applies to them the statutory scheme as it is construed." *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 498 (1958). Specifically in the context of Section 925(c) applications, "[w]hile district courts are well equipped to make credibility judgments and factual determinations, they are without the tools necessary to conduct a systematic inquiry into an applicant's background." *Mullis*, 230 F.3d at 219. Likewise, courts lack the power, on their own initiative, to identify and to interview the various witnesses who could offer relevant testimony or observations on the suitability of a particular applicant for restoration of those privileges. *Cf. Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 365-66 (1998) (recognizing the differences between trials and administrative hearings in the context of parole revocation hearings).

Instead, in a trial, courts must rely solely on the factual development provided by the parties through their own initiative and acquired through the discovery process. *See, e.g.*, *Pontarelli*, 2002 U.S. App. LEXIS 5309, at *45 ("Because courts are without the tools necessary to conduct a systematic inquiry into an applicant's background, if they reviewed applications de novo they would be forced to rely primarily—if not exclusively—on information provided by the felon. As

few felons would volunteer adverse information, the inquiry would be dangerously one-sided.") (internal quotation marks and citations omitted). That process, however, is an inadequate substitute for the information that can be developed through the full investigation that Congress envisioned prior to any decision on whether to restore firearms privileges. *See Volpe*, 401 U.S. at 419-20 (noting that evidence offered by parties in judicial proceeding supply "inadequate basis for review" of agency decision and remanding matter to lower courts to consider decision in light of the "full administrative record that was before the Secretary at the time he made his decision"). It is especially inadequate in this case because the appropriations legislation prevents ATF from "investigat[ing]" the reasons why a particular application should be denied. As a result, any court deciding whether to grant an application to restore privileges will have before it an inadequate picture from which to render a decision.[9]

The Court of Appeals ignored ATF's unique ability to perform this investigative function. Instead, it effectively deputized district courts to serve as surrogate investigators for any petition to restore firearms. In light of the substantial differences between the respective abilities of the executive branch and the courts to conduct the necessary factual development prior to any decision on an application, Congress hardly could have intended this reallocation of authority from one branch to another. Indeed, Section 925(c) itself suggests that Congress never intended for courts to serve as the predominant forum for factual development and initial adjudication of Section 925(c) applications. By providing that courts only could consider evidence outside of the administrative record where a miscarriage of justice otherwise would result,

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9 Thus, the district court in this case was flatly wrong when it suggested that it was well positioned to decide whether to restore Bean's firearms privileges absent any administrative record. (Pet. App. 28a-29a.)

Congress narrowly cabined courts' roles. *See Pontarelli*, 2002 U.S. App. LEXIS, at *44 ("District courts' institutional limitations suggest that Congress could not have intended for the appropriations ban to transfer to them the primary responsibility for determining whether to restore felons' firearms privileges."). It would be absurd to think that, by stripping the executive agency's role in investigating applications, Congress intended the federal district courts to step into their shoes. Such a result ignores the intelligible division of roles between the executive and judicial branches that underpins the Section 925(c) application system.

III. THE LEGISLATIVE HISTORY, LIKE THE STATUTORY STRUCTURE, MAKES CLEAR CONGRESS'S INTENT TO STOP RE-ARMING FELONS.

The legislative history confirms Congress's manifest intent to suspend the operation of Section 925(c). Congress acted swiftly and decisively in response to the 1992 VPC report to end the federal program providing for re-arming convicted felons. In taking this action, Congress did not intend to have federal courts replace ATF as the government officials handing back firearms to felons. As Senator Simon stated on the Senate floor: "Let me make this point perfectly clear: It was never our intent, nor is it now, for the courts to review a convicted felon's application for firearm privilege restoration." 142 Cong. Rec. S12164 (daily ed. Oct. 2, 1996).[10] By contrast, "not a single member of Congress suggested that the appropriations ban would give courts the au-

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10 *See also id.* (daily ed. Oct. 2, 1996) (statement of Senator Simon) ("A recent court case in Pennsylvania misinterpreted our intentions and opened the door for these convicted felons to apply for judicial review of their disability relief applications."). Senator Simon, of course, was criticizing the Third Circuit's decision in *Rice v. United States*, 68 F.3d 702 (3d Cir. 1995), which the en banc Third Circuit subsequently overruled in *Pontarelli* precisely to bring its rule in line with Congress's intent.

thority to evaluate § 925(c) applications in the first instance." *Pontarelli*, 2002 U.S. App. LEXIS 5309, at *34.

Indeed, the legislative history is replete with references to Congress's intent to close the "loophole" in the otherwise blanket prohibition against re-arming felons. It cannot plausibly be suggested that a Congress so devoted to closing this "loophole" intended at the same time to open another by allowing district judges to do what ATF could not—re-arm felons.

Congress feared—following the VPC report—that successful applicants under Section 925(c) would commit further crimes: "After ATF agents spend many hours investigating a particular applicant they must determine whether or not that applicant is still a danger to public safety. This is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made." S. Rep. No. 102-353, 19-20 (1992).[11] Legislators repeatedly stressed the potential dangerousness of the existing gun relief legislation. One co-sponsor of the appropriations measure, Senator Lautenberg, declared: "It is also placing innocent Americans at risk. Even after ATF performs a full-blown investigation, there is no way to be sure that a convicted felon isn't going to go out and commit another crime. In fact, there's real cause for concern. Criminals granted relief have later been rearrested for crimes ranging from attempted murder to rape and kidnapping." 138 Cong. Rec. S13241 (daily ed. Sept. 10, 1992) (statement by Senator Lautenberg).[12]

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11 *See also* S. Rep. No. 103-106, at 20 (1993) (using the same language).

12 *See also* H.R. Rep. No. 102-618, at 14 (1992) ("Under the relief procedure, ATF officials are required to guess whether a convicted felon or a person committed to a mental institution can be entrusted with a firearm. . . . [T]he Committee has included language which states that no

Congress thus acted, in the face of mounting public opposition[13] to close this "loophole":

> Most Americans probably would be amazed that this provision is even necessary, Mr. President. How can it be, at a time of rising violence throughout our Nation, that our laws put guns into the hands of convicted violent felons? It defies common sense. But it is true. Let me explain. Generally speaking, as one would expect, felons are prohibited by Federal law from possessing firearms. However, there is a gaping loophole. I call it the "guns for felons" loophole. Under this loophole, convicted felons and others prohibited from possessing firearms may submit an application to ATF.

138 Cong. Rec. S13241 (daily ed. Sept. 10, 1992) (Sen. Lautenberg).[14]

The question in this case is ultimately an issue of statutory construction and congressional intent. As set forth

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appropriated funds be used to investigate or act upon applications for relief from Federal firearms disabilities.").

13 *See $4 Million a Year To Rearm Felons*, Wash. Post, Nov. 27, 1991, at A16 ("In general, such individuals are prohibited from possessing, shipping, transporting or receiving firearms, but a special exception was created to allow the federal government to restore these rights in some circumstances. The loophole was created to save the Winchester Firearms Co.—whose parent company had been convicted in a kickback scheme—from bankruptcy.").

14 *See also Stop Arming Felons Act: Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 102d Cong. (1992) (statement by Rep. Smith) ("But in 1965, an unexpected event opened a loophole in this prohibition on guns. . . . [U]nfortunately, this loophole, this exemption designed for one company has been used as a second-chance club by tens of thousands of felons."); 139 Cong. Rec. S10848 (daily ed. Aug. 6, 1993) (statement of Senator Lautenberg) (referring to the "guns for felons" loophole).

above, the text and structure of the applicable statutes make plain that Congress certainly did not envision that, once it prevented ATF from conducting investigations into petitions filed under Section 925(c), federal courts would be able to circumvent the prohibition by "reviewing" the failure of ATF to act, and then themselves grant relief from the disability imposed under Section 922(g). The legislative record confirms this, as members of Congress repeatedly noted that the purpose of the appropriations measures is to close the "loophole" that previously permitted felons to obtain firearms. There is no reason to ascribe to Congress any intention—while closing one loophole—to open another.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APRIL 2002

Supreme Court, U.S.
FILED
JUN 14 2002
OFFICE OF THE CLERK

No. 01-704

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,

Petitioners

v.

THOMAS LAMAR BEAN,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR AMICUS CURIAE LAW ENFORCEMENT ALLIANCE OF AMERICA, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Law Enforcement Alliance of America, Inc. (LEAA) is a non-profit, non-partisan advocacy organization made up to tens of thousands of law enforcement professionals, crime victims, and concerned citizens dedicated to making America safer. LEAA is committed to preservation of the rights guaranteed by the Bill of Rights, especially the Second Amendment guarantee of the right to keep and bear arms.

LEAA represents its members' interests by assisting law enforcement professionals, securing victims' rights over criminals' rights, seeking criminal justice reforms that target violent criminals, not law-abiding citizens, and explaining, from a law enforcement perspective, why firearms regulation is not effective in controlling crime.

Amicus Curiae submits this brief with the consent of the parties.

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity other than *Amicus Curiae* made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The failure of the Director of the Bureau of Alcohol, Tobacco & Firearms (hereinafter "BATF") to act on Bean's request for relief from the disabilities imposed by Federal laws with respect to firearms was a "denial" since the action met the criteria for final agency action under *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980).

The Appropriations Acts only deny funding to the BATF, not to the Secretary or any other agency of the Treasury Department, nor to the judiciary. Thus, as § 925(c) grants authority to the Secretary, Congress has not repealed or suspended § 925(c).

Because repeals by implication are not favored and there must be clear and convincing evidence of congressional intent to restrict access to judicial review, Congress' action in removing the BATF's authority to act upon requests for relief from disability cannot be viewed as also removing a district court's jurisdiction to conduct judicial review of such failure to act.

Construing the removal of the BATF's authority to act upon such requests as also removing a district court's jurisdiction to conduct judicial review results in the creation of an irrebuttable presumption that Bean is forever likely to act in a manner dangerous to public safety. Since irrebuttable presumptions are disfavored under the Due Process Clause of the Fifth Amendment, Congress' action in removing the BATF's authority to act upon requests for relief from the disabilities imposed by federal law with respect to firearms should not be

viewed as also removing a district court's jurisdiction to conduct judicial review.

The decisions of the courts of appeals in conflict with Bean are flawed as they ignored the rules of statutory construction regarding repeals by implication as established by this Court or determined that the BATF's failure to act was not a denial. Further, the courts of appeals overlooked the statutory powers of the district courts to direct probation officers to conduct investigations of applicants.

ARGUMENT

I. § 925(c) Grants The District Court Subject Matter Jurisdiction

A. Introduction

18 U.S.C. § 925(c) authorizes persons prohibited from possessing firearms under federal law to apply to the Secretary of the Treasury for "relief from the disabilities imposed by Federal laws with respect" to firearms.[2] The Secretary is authorized to grant such relief if, based on "the circumstances regarding the disability" and "the applicant's record and reputation," the applicant "will not be likely to act in a manner dangerous to public safety" and "granting of the relief would not be contrary to the public interest."

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[2] The administration and enforcement of Chapter 44 of Title 18, of which § 925(c) is a part, was granted to the Secretary. § 103, Pub.L. 90-618, 82 Stat. 1212 (1968).

In 1972, the Secretary created the BATF as a bureau within the Department of the Treasury and directed the BATF to "perform the functions, exercise the powers, and carry out the duties of the Secretary." Treas. Dept. Order No. 120-01 (formerly 221), 37 Fed.Reg. 11,696 (1972).[3] One of those functions, powers, and duties was the processing of applications for relief from disabilities. Despite the administrative delegation thirty (30) years ago, Congress has not amended § 925(c) to shift the authority to grant relief to the BATF. Thus, the authority remains in the hands of the Secretary.

In its current form, § 925(c) was enacted as part of the Firearms Owners Protection Act ("FOPA"), Pub.L. 99-308, 100 Stat. 449 (1986). As enacted in 1986, § 925(c) provides for judicial review:

> Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice.

Petitioners argue that the district court did not have subject matter jurisdiction pursuant to § 925(c) over Bean's petition for judicial review since he was not "denied" relief from disabilities within the meaning of § 925(c) in that the BATF had

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[3] The functions, powers, and duties were "transfer[red]" from the Internal Revenue Service.

informed Bean:

> Since October 1992, ATF's annual appropriation has prohibited the expending of any funds to investigate or act upon applications for relief from Federal firearms disabilities.

The basis for Petitioners' assertion that Bean was not "denied" relief from disabilities was that, in the annual appropriations acts for the Treasury Department, the Treasury, Postal Service and General Government Appropriations Acts ("Acts"), Congress prohibited the expenditure of funds appropriated for the BATF to be used "to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. § 925(c)."

To support Petitioners' interpretation of the Acts as the Acts affect § 925(c), they rely upon the reasoning of several cases decided by the courts of appeals, including: *United States* v. *McGill*, 74 F.3d 64 (5th Cir. 1996), *Burtch* v. *United States Dept. of Treasury*, 120 F.3d 1087 (9th Cir. 1997), *Owen* v. *Magaw*, 122 F.3d 1350 (10th Cir. 1997), *Mullis* v. *United States*, 230 F.3d 215 (6th Cir. 2000); *McHugh* v. *Rubin*, 220 F.3d 53 (2d Cir. 2000); and *Saccacio* v. *ATF*, 211 F.3d 102 (4th Cir. 2000).

B. The Failure To Act On Bean's Request Was A Denial

In *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 239-40 (1980), this Court set out the indicia of finality for purposes of the availability of judicial review: the action of the agency must be a definitive statement of the agency's position; the action

must have a direct and immediate effect on the complainant; it must have the status of law; immediate compliance with the action is expected; and the question must be a legal one. No where did the Court suggest that an agency's failure to act deprives the district courts of jurisdiction. Indeed, such a proposition could not be countenanced since it would enable an agency to evade judicial review by the simple expedient of taking no action.

The BATF's failure to act on Bean's request for relief from disabilities fits every one of the *FTC* criteria. Thus, there was a final denial of Bean's request, which, if the district court was not deprived of jurisdiction by the Acts, the district court was compelled to review.

B. The Appropriations Acts Do Not Do Not Deprive The District Courts Of Subject Matter Jurisdiction

As the BATF's failure to act was a denial, the issue remains whether Congress intended to remove the district court's jurisdiction to review such denials. The starting point in addressing the issue is the language of the Acts and the language of § 925(c). *Ardestani* v. *INS*, 502 U.S. 129, 135 (1991).

In *King* v. *St. Vincent's Hospital*, 502 U.S. 215 (1991), this Court held that "the meaning of statutory language, plain or not, depends on context." 502 U.S. at 221.[4] In relevant part,

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[4] The Court explained: "'Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . .' (citations omitted)." 502 U.S. at 221.

the Acts state:

TITLE I - DEPARTMENT OF THE TREASURY

Departmental Offices
Salaries and Expenses

* * * *

Bureau of Alcohol, Tobacco and Firearms
Salaries and Expenses

For necessary expenses of the Bureau of Alcohol, Tobacco and Firearms, . . . $768,695,000, . . . : *Provided*, That no funds made available by this or any other Act may be used to transfer the functions, missions, or activities of the Bureau of Alcohol, Tobacco and Firearms to other agencies or Departments in fiscal year 2001: . . . ***Provided further*, That none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)** . . . . *Provided further*, That no funds under this Act may be used to electronically retrieve information gathered pursuant to 18 U.S.C. 923(g)(4) by name or any personal identification code.

United States Customs Service
Salaries and Expenses

* * * *

General Provisions - Department of the Treasury

* * * *

This title may be cited as the "Treasury Department Appropriations Act, 2001".

Pub.L. 106-554, 114 Stat. 2763C-1, -4, -5, -11 (2000)(emphasis added).[5]

Thus, as the "funds appropriated herein" language (in bold above) refers to those funds appropriated to BATF, the denial of funds is solely to the BATF. *Cf.* "*Provided further*, That *no funds under this Act* may be used to electronically retrieve information gathered pursuant to 18 U.S.C. 923(g)(4) by name or any personal identification code." (emphasis added.).[6]

Although § 925(c) authorizes the *Secretary* to grant relief from disability, Congress did not deny funds to any other agency of the Treasury Department (e.g., Secret Service,

[5] In relevant part, the Acts have not changed from year to year.

[6] "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

Customs Service, IRS, Inspector General)[7] or indeed, to any other executive branch department[8], or, most significantly, to the judiciary.[9] Despite this focused action by Congress,

[7] The proviso that "no funds . . . may be used to transfer the functions, missions, or activities of the [BATF] to other agencies or Departments" does not deny funds to the Secretary since he is not another agency or Department. The proviso also does not deny funds to another agency of the Treasury Department. Because the BATF has been denied the function, mission, or activity of processing applications for relief from disability, if the Secretary chose to have another agency within the Treasury Department process applications, he would not be using funds to "transfer" a function, mission, or activity of the BATF to another agency of the Treasury Department, but rather would be redirecting a function, power, or duty.

[8] It is thus patently untrue that "Congress has deliberately and unequivocally suspended the *Executive's* ability to implement [§ 925(c)]." Brief For The Petitioners 13 (emphasis added).

[9] An attempt was made in 1996 to amend the appropriations bill to prohibit judicial review, but it failed. The bill (which would be enacted as the Treasury, Postal Service, and General Government Appropriations Act, 1997) included the following, with the explanation that, as reported by the Committee on Appropriations, "the parts of the bill intended to be stricken are shown in boldface brackets":

> Provided further, That none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c) **(and the inability of the Bureau of Alcohol, Tobacco and Firearms to process or act upon such applications for felons convicted of a violent crime, firearms violations, or drug-related crimes shall not be subject to judicial review)**: Provided further, that such funds shall be available to investigate and act upon applications filed by

Petitioners views the Act as also depriving the district court of subject matter jurisdiction.

While Congress certainly may use appropriations acts to amend substantive legislation, it is a "cardinal rule . . . that repeals by implication are not favored." *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936). More particularly, this Court has stated, with regard to repeals by implication in appropriations bills:

> The doctrine disfavoring repeals by implication "applies with full vigor when . . . the subsequent legislation is an *appropriations* measure." (citation omitted). This is perhaps an understatement since it would be more accurate to say that the policy applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act.

TVA v. *Hill*, 57 L.Ed. 2d 117, 143-44 (1978).

This doctrine is not the only governing rule of statutory construction in the case at bar: there must also be "'clear and convincing' evidence of congressional intent . . . before a statute will be construed to restrict access to judicial review." *Johnson* v. *Robison*, 415 U.S. 361, 373-74 (1974). Here, because

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> corporations for relief from Federal firearms disabilities under 18 U.S.C. 925(c) . . . .

142 Cong. Rec. S10139, 10141 (Sept. 10, 1996). The above remains the current version, without the stricken language.

Congress did not amend the appropriations for the judiciary, that "clear and convincing" evidence is lacking. Thus, the Acts cannot be construed to restrict access to the judicial review provided by § 925(c).

Finally, in construing the Acts, the effect on Bean's constitutional rights of Petitioners' construction of § 925(c) and the Acts must be taken account of to avoid a result which would render the Acts unconstitutional.[10]

In *Heiner* v. *Donnan*, 285 U.S. 312 (1932), this Court held:

> [A] statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteen Amendment.

285 U.S. at 329.

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[10] In *Meachum* v. *Fano*, 427 U.S. 215 (1976), this Court said of liberty interests:

> "[A] person's liberty is equally protected, even when the liberty itself is a *statutory creation* of the State. The touchstone of due process is protection of the individual against arbitrary action of Petitioners . . . . (citation omitted)." (emphasis added).

427 U.S. at 226.

Thus, a liberty interest may be created by statute. The liberty interest in the case at bar is that created by § 925(c), which gives Bean the right to apply for relief.

Subsequently, in *Vlandis* v. *Kline*, 412 U.S. 441 (1973), the Court reiterated:

> Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments.

412 U.S. at 446.

Vlandis thus concluded:

> [A] permanent irrebuttable presumption of nonresidence . . . is violative of the Due Process Clause, because it provides no opportunity for students who applied from out of State to demonstrate that they have become bona fide Connecticut residents.

412 U.S. at 453.

Petitioners' contention that the Acts deprived the district court of subject matter jurisdiction places Bean in the same position as the students in *Vlandis*; he has no opportunity to demonstrate that he will not be likely to act in a manner dangerous to public safety and that granting relief from disabilities would not be contrary to the public interest.[11] Thus,

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[11] *Vlandis* remains good law even after *Weinberger* v. *Salfi*, 422 U.S. 749 (1975) as *Weinberger* did not overturn *Vlandis*. Rather, *Weinberger* distinguished the statute it was reviewing from that at issue in *Vlandis* as follows:

> The Court [in *Vlandis*] held that where Connecticut purported to be concerned with residency, it might not at the same time deny to one seeking to meet its test of residency the opportunity to show factors clearly bearing on that issue. . . . Unlike the statutory scheme in *Vlandis*, the Social Security Act does not purport to speak in terms of the bona fides of the parties to a marriage, but then make plainly relevant evidence of such bona fides inadmissible.

422 U.S. at 771-72.

Indeed, this Court went to note that "appellees are completely free to present evidence that they meet the specified requirements . . . ." 422 U.S. at 772.

if the Acts are construed as depriving the district courts of subject matter jurisdiction, they violate the Due Process Clause of the Fifth Amendment.[12] To avoid that result, the Acts should not be construed as repealing or suspending § 925(c): "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909).

Applying the above rules of construction to the Acts compels the conclusion that the Acts' prohibition must be very narrowly construed and limited to its literal language, i.e., that

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[12] In enacting the FOPA, Congress found, *inter alia*, that " (1) the rights of citizens – (A) to keep and bear arms under the second amendment to the United States Constitution; . . . (C) . . . *assurance of due process under the fifth amendment* . . . require addition legislation to correct existing firearms statutes and enforcement policies . . . ." § 1, 100 Stat. 449 (emphasis added).

the *BATF*, and no other entity, is prohibited from "investigat[ing] or act[ing] upon applications for relief" and nothing more.

Had Congress intended to repeal § 925(c) or to preclude judicial review of BATF's failure to grant relief from firearms disabilities, it could very easily have stated that § 925(c) was repealed or that the judiciary was denied funds to consider petitions for review. Congress has done neither.[13]

D. The Decisions Of The Courts Of Appeals In Conflict With *Bean* Rely Are Flawed

The cases upon which the Petitioners relies are each flawed and their reasoning should be rejected by this Court.

Turning first to *McGill, supra*. Despite the clear language of the § 925(c) and the Acts, the court of appeals founded its holding on a statement in the Senate Appropriations Committee Report concerning the activities of the BATF with

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[13] While congressional silence is not useful legislative history, the failure of affirmative efforts to amend statutes shed some light on congressional intent. *See Hutto v. Finney*, 437 U.S. 678, 694 (1978) ("Congress' intent was expressed in deeds as well as words. It rejected at least two attempts to amend the Act"). With respect to § 925(c), S. 1068, the "Stop Arming Felons (SAFe) Act," would have amended the first sentence of § 925(c) to insert "(other than a natural person)" after the word "person," the effect of which would be that no natural person could apply for relief from disabilities. 141 Cong. Rec. S10570-71 (July 24, 1995). The bill failed to pass.

regard to applications for relief from disabilities.[14] 74 F.3d at 67. Based on that statement, the court held:

> We cannot conceive that Congress intended to transfer the burden and responsibility of investigating the applicant's fitness to possess firearms from the ATF to the federal courts, which do not have the manpower or expertise to investigate or evaluate these applications.

Id. [15]

In so holding, *McGill* overlooked the fact that the Report made *no* mention of the powers of the judiciary, but simply focused on the BATF.

Moreover, the court of appeals did not review any of the hearings that were the basis for the statement found in the Senate Appropriations Committee Report. At the Senate subcommittee hearing, "the Director of the ATF responded to

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[14] As succinctly explained by the U.S. Court of Appeals for the District of Columbia Circuit: "Committee reports, we remind, do not embody the law. Congress, as Judge Scalia recently noted, votes on the statutory words, not on different expressions packaged in committee reports. *Hirschey* v. *FERC*, 777 F.2d 1, 7-8 & n. 1 (D.C. Cir. 1985) (Scalia, J., concurring)." *Abourezk* v. *Reagan*, 785 F.2d 1043, 1054-55, n. 11 (D.C. Cir. 1986).

[15] While the *McGill* court held that the district court lacked subject matter jurisdiction, it did not hold that the failure to act upon an application was not a "denial" within the meaning of § 925(c). Rather, the court concluded that "Congress has suspended the relief provided in § 925(c) for individuals." 74 F.3d at 68.

questions pertaining to the relief provisions. *See* Treasury, Postal Service, and General Petitioners Appropriations for Fiscal Year 1993: Hearings on H.R. 5488 Before the Subcomm. Of the Senate Comm. on Appropriations, 102d Cong. 69 (1993)." *Bean* v. *United States*, 89 F.Supp. 2d 828, 834 (E.D.Tex. 2000).

> The Director testified that although "every year about 3,000 to 4,000 people express an interest in (applying for relief)," only 1,000 applications (approximately) are found eligible to be acted upon. *Id.* However, the ATF had requested $3.7 million to fund the relief from disabilities program for the 1993 fiscal year. *Id.* According to these numbers, the ATF was spending an average of $3,700 per investigation.

89 F.Supp. 2d at 834.

In view of the Director's testimony, it is apparent that Congress' purpose in prohibiting the BATF from expending funds was to prevent the BATF from continuing its inefficient and wasteful procedures rather than eliminating the availability of relief itself. Had that been Congress' purpose, it would have clearly conveyed that purpose by prohibiting the expenditure of funds by the Secretary or his delegate, as it is the Secretary, not the BATF, upon whom § 925(c) imposes the duty to process applications for relief from disabilities.

Further, the court of appeals founded its conclusion on what it could "conceive" and ignored the rules of construction enunciated in *Posadas*, *supra*, *TVA* v. *Hill*, *supra*, and *Johnson*

v. *Robison*, *supra*, to wit, that there must be clear intent to repeal § 925(c) or to preclude judicial review of BATF's failure to grant relief from firearms disabilities. In addition, the court of appeals did not consider the consequences for McGill's Fifth Amendment right not to be deprived of a liberty interest without due process.

McGill also concluded that the federal courts "do not have the manpower or expertise to investigate or evaluate these applications." 74 F.3d at 67. That conclusion is both immaterial and overstates the burden on the district courts.

It is immaterial since the policy question of whether the district courts should review the denial of applications for relief from disability is for Congress to make. That Congress has neither repealed the judicial review provision of § 925(c) nor prohibited the expenditure of funds by the judiciary on determinations pursuant to § 925(c) evidences that Congress has made the policy judgment that the district courts *should* determine applications for relief from disability.

The "manpower" burden on the district courts is governed by the criteria set forth in § 925(c), i.e., the matters to be considered are only "the circumstances regarding the disability, and the applicant's record and reputation . . . ." The "circumstances regarding the disability" require little effort to determine since they are set forth in a court record. Similarly, the "applicant's record and reputation" are readily determinable since the district court's probation office routinely, in preparation of Presentence Reports, obtains individuals' records and investigates their backgrounds, including interviewing family and others. 18 U.S.C. § 3552(a); Rule 32(b)(4),

Fed.R.Crim.Pro.[16] If there was any question concerning the district courts' authority to utilize probation officers to conduct investigations, 18 U.S.C. § 3603 broadly commands, *inter alia*, that, in addition to specific enumerated duties, a probation officer shall "perform any other duty that the court may designate." Thus, there is clear statutory authority for district courts to have probation officers conduct investigations of applicants for relief from disabilities.

Moreover, since it is the applicant's burden to prove his eligibility, he can produce witnesses to testify at a hearing, including character references (such as family members, employers, and neighbors), to establish his "reputation." Such a hearing is not only within the institutional competence of a district court, but could be readily conducted.

It is also not the case that the district court lacks the "expertise" to make determinations concerning relief. District courts, in determining conditions of release (18 U.S.C. § 3142),

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[16] That report must contain, *inter alia* --

> (A) information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment . . . and
>
> (H) any other information required by the court.

Rule 32(b)(4), Fed. R. Crim. Pro.

sentencing convicted criminal defendants (18 U.S.C. § 3553), and reviewing violations of probation (18 U.S.C. § 3565) regularly evaluate the likelihood that an individual will be a threat to public safety. Indeed, district courts are institutionally *better* equipped than the BATF to make such judgments since the BATF is an investigative agency focused on arrests and prosecutions, whereas district courts are adjudicative in nature.

Finally, if the district courts consider grants of relief from disabilities, much of the financial burden with which Congress was concerned would be placed on the applicant since he, not the BATF, would be responsible for paying court costs and his own attorney's fees. In addition, if facts alleged by an applicant did not "have evidentiary support," the applicant could be assessed sanctions, including "an order to pay a penalty into court" and "reasonable attorneys' fees" pursuant to Rule 11, Fed.R.Civ.Pro.

In short, the burden on the district court is minimal.

Turning to *Burtch*, *supra*, while the Ninth Circuit properly ignored the legislative history relied on in *McGill*, the court nonetheless failed to heed the teachings of *Posadas*, *supra*, *TVA* v. *Hill*, *supra*, and *Johnson* v. *Robison*, *supra*, or the impact on Burtch's right to due process in concluding that "the failure to appropriate investigatory funds should be interpreted as a suspension of that part of section 925(c) which is affected." 120 F.3d at 1090.

The court in *Burtch* justified its conclusion in part by stating that "the statute does not authorize the district court to build a record from scratch or make discretionary policy

determinations in the first instance if the Secretary does not." *Id.* Neither of these conclusions is supported by the language and history of § 925(c).

First, § 925(c) authorizes the district court to "admit additional evidence where failure to do so would result in a miscarriage of justice." Plainly, therefore, the district court may build whatever record is necessary to avoid "a miscarriage of justice." The use of the word "additional" does not suggest that there must first be an administrative record. If that were so, the Secretary could effectively preclude *any* judicial review by denying applications without making an administrative record, even when funding existed. Clearly, Congress did not intend such a result. Rather, Congress sought to allow the district court to admit whatever evidence was necessary for the court to make an informed decision.

The legislative history supports such an understanding. Senator Hatch, the FOPA floor manager, inserted into the record a comparison of existing law with the Senate and House versions of FOPA. 132 Cong. Rec. S5351 (May 6, 1986). Existing law was described in part as follows:

> Relief from disabilities of conviction of a crime punishable by imprisonment for a term exceeding 1 year may be granted by the Secretary if satisfied that relief would not be contrary to public interest and safety. A person is ineligible to apply if his crime involved the use of a firearm or other weapon or if convicted of a violation of the Gun Control Act or the National Firearms Act [18 U.S.C. 925(c)]. Judicial review is limited to the administrative record to determine if a reason existed for denial of relief.

Id. at S5354.

By contrast, the Senate and House versions of S. 49 (FOPA) were described as follows:

> Allows relief for all categories of persons having Federal firearms disabilities and removes the bar to relief for felons whose crimes involved or whose conviction was for a violation of GCA or NFA. Expressly provides for judicial review and *the court may hold a trial de novo*.

Id. (emphasis added).

Because Congress contemplated that the reviewing court would not be bound by an administrative record where none exists ("the court may hold a trial de novo"), a full record may be created by the court in the trial *de novo*.

Second, § 925(c) does not call for the district court to make "discretionary *policy* determinations . . . ." *Burtch*, 120 F.3d at 1090 (emphasis added). Rather, the statute authorizes the Secretary, in the first instance, to determine, based only on "the circumstances regarding the disability, and the applicant's record and reputation," whether the applicant "will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." Thus, there is no "policy" decision to be made by the

Secretary.[17] *A fortiori*, there is no "policy" decision to be made by the district court. Rather, the district court would only evaluate "the circumstances regarding the disability, and the applicant's record and reputation" and determine whether the applicant "will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."

Since the statute authorizes the district court to "admit additional evidence where failure to do so would result in a miscarriage of justice," it is evident that Congress intended the district court to review the evidence itself and make its own independent determination of the applicant's potential for acting dangerously and contrary to public safety, based upon "the circumstances regarding the disability, and the applicant's record and reputation . . . ." As discussed above, such an evaluation is

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[17] The "established to his satisfaction" language does not grant "broad discretion to the Secretary" as contended by Petitioners. Brief of The Petitioners 14. In *United States* v. *Jefferson Elec. Mfg. Co.*, 291 U.S. 386 (1934), this Court held about the term "established to the satisfaction of the Commissioner":

> Only by inadmissible straining could it be held to invest the Commissioner with absolute authority or discretion . . . . A more rational view is that it is largely admonitive and means that the additional element is not lightly to be inferred but to be established by proof which convinces in the sense of inducing belief. Such words often are so construed where applied to one who, like the Commissioner, is charged with the duty of ascertaining a matter of fact as a basis for further action.

291 U.S. at 397-98.

well within the institutional competence of the judiciary.

The third case relied on by Petitioners, *Owen* v. *Magaw*, *supra*, primarily focused on the language in § 925(c) which authorizes "the Secretary" to grant relief.[18] Thus, according to the Tenth Circuit, because the "only role for the judiciary is judicial review of a *denial* of relief" (emphasis added), the district courts cannot act where the Secretary has failed to consider an application for relief. 122 F.3d at 1354. While not expressly stated, the Tenth Circuit apparently did not view the Secretary's failure to act as a "denial," thereby barring judicial review. The Secretary's failure to act, however, must be viewed as a denial since it is plainly a final decision.[19] When properly viewed as a denial, it follows that the district court may act.

In the next case relied on by Petitioners, *Mullis*, *supra*, the court of appeals held that "the statute contemplates judicial review of the discretion exercised by the Secretary in denying an application, not independent judicial discretion exercised in a de novo review of an application." 230 F.3d at 219. As discussed, *supra*, however, the fact that the district courts are to "admit additional evidence where failure to do so would result in a miscarriage of justice" indicates that district courts are to make independent determinations, i.e., *de novo*. That conclusion is buttressed by the Senate floor debate discussed

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[18] *Owen* v. *Magaw*, *supra*, also adopted the reasoning of *McGill* concerning the district court's "manpower and expertise . . . ." 122 F.3d at 1354. *Owen*'s reasoning is without foundation for the reasons set out, supra.

[19] See *FTC* v. *Standard Oil Co.*, *supra*.

above. Thus, the court of appeals misinterpreted § 925(c). The court of appeals also erred in concluding that district courts are "without the tools necessary to conduct a systematic inquiry into an applicant's background." 230 F.3d at 219. As noted previously, with the district court's authority over probation officers, the district court is more than adequately equipped to conduct a thorough investigation of an applicant.

In *McHugh*, *supra*, the court of appeals stated that the "sole, dispositive question . . . is whether the ATF 'denied' McHugh's petition." 220 F.3d at 60. In answering the question in the negative, the court of appeals held that "the word 'denial' connotes more than a mere refusal to act." Id. The court of appeals did not, however, consider this Court's decision in *FTC* v. *Standard Oil Co.*, *supra*, where this Court set out the indicia of finality for purposes of the availability of judicial review and in which this Court did not suggest that an agency's failure to act deprives the district courts of jurisdiction. As noted earlier, this Court did not suggest that an agency's failure to act deprives the courts of jurisdiction since such a holding would enable an agency to avoid judicial review by the simple expedient of taking no action.

Finally, in *Saccacio*, *supra*, the court of appeals concluded that the BATF's failure to "act upon Saccacio's application" was not a denial because it "is not 'an adverse determination on the merits' . . . ." 211 F.3d at 104. Once again, as with *McHugh*, *supra*, the court of appeals did not, consider this Court's decision in *FTC* v. *Standard Oil Co.*, *supra*. Thus, the court of appeals erred in holding that the BATF's failure to "act upon Saccacio's application" was not a denial.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

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Supreme Court, U.S.
FILED
JUN 14 2002
OFFICE OF THE CLERK

(8)

No. 01-0704

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, ET AL., PETITIONER

v.

THOMAS LAMAR BEAN, RESPONDENT

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF OF SECOND AMENDMENT FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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United States v. MacIntosh, 283 U.S. 605 (1931), overruled *Girouard v. United States*, 328 U.S. 61 (1947).....24
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David B. Kopel, *The Sound of the Supremes: A Reply to Professor Yassky*: St. Louis University Public Law Review: Gun Control Symposium, vol 18, no. 1, 1999 : 203.....21
David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998: 1359. Brigham Young University Law Review: Second Amendment Symposium, 1998, No. 1.....21
Stephen P. Halbrook, *The Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876 for historical context and Founders intent for the Fourteenth Amend., the Freedmen Bureau Acts, and the Civil Rights Act of 1871*, Praeger Publishers, 1998.....27

No. 01-704

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

THOMAS LAMAR BEAN, RESPONDENT

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF OF SECOND AMENDMENT FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE[1]

The Amicus Curiae Second Amendment Foundation

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1. Counsel for amicus curiae authored this brief in its entirety. No person or entity other than amicus curiae, its members, and its counsel made a monetary contribution to the preparation or submission of the brief. The written consent of all parties to the filing of this brief is attached hereto.

("SAF") is a non-profit educational foundation dedicated to promoting a better understanding about our Constitutional heritage to privately own and possess firearms. SAF was incorporated in August 1974 under the laws of the State of Washington. It is a tax-exempt organization under §§501(c)(3) of the Internal Revenue Code. The SAF's purpose is to preserve the effectiveness of the Second Amendment to the United States Constitution and provide aid and information to people throughout the United States. To that end, SAF carries on many nationally recognized educational and legal action programs designed to better inform the public about the gun control debate. SAF has a broad base of support with 600,000 members and supporters residing in every state of the union. In addition to numerous books, articles, and national seminars, SAF publishes the Journal of Firearms and Public Policy.

SAF files this amicus curiae brief to urge the constitutional principle that the Second Amendment to the Constitution of the United States protects individual citizens' rights. This brief is intended to direct this Honorable Court's attention to this principle and to point out that the issue before the Court involves rights, not privileges.

SUMMARY OF ARGUMENT

The Amicus Curiae Second Amendment Foundation urges the Court that the Second Amendment to the Constitution of the United States contains a fundamental, individual right concerning the keeping and bearing of firearms. It is not a privilege to own firearms, it is a constitutional right. Thomas Lamar Bean temporarily lost that right by his petty, foreign conviction. However, a right

exists under 18 U.S.C. 925(c) by which the Secretary of the Treasury may restore the right, or an independent right exists under 28 U.S.C. 1337(a) for Mr. Bean to pursue the restoration of his rights in the District Court.

Congress defunded the ATF from conducting investigations related to a restoration of rights under 18 U.S.C. 925(c), but that did not relieve the Secretary of his statutory obligation to consider Mr. Bean's application. When the Secretary failed to comply with his statutory duty, thereby effectively denying Mr. Bean's application, resort to the District Court was appropriate.

Further, upon consideration of the numerous references by the Court to the individual nature of the right to keep and bear arms, this case is an opportunity for the Court to clearly affirm the right to keep and bear arms.

ARGUMENT

1. THE SECOND AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES PROTECTS FUNDAMENTAL INDIVIDUAL RIGHTS WHICH THE SECRETARY OF THE TREASURY IS REQUIRED TO CONSIDER FOR RESTORATION, OR THE DISTRICT COURT MAY CONSIDER RESTORATION.

A. The District Court Has Original Jurisdiction To Consider A Restoration Of Firearms Rights Under 28 U.S.C. 1337(a).

The Petitioners claim in their brief that the

jurisdiction of the District Court is limited to a review under the Administrative Procedure Act by virtue of the language of 18 U.S.C. 925(c). The brief states: "The scope of judicial review in such an action is governed by the Administrative Procedure Act (APA), 5 U.S.C. 706. See S. Rep. No. 583, 98th Cong., 2d Sess. 26-27 (1984)." Footnote 1 to that quote states:

> 1 Congress first provided an avenue for relief from firearms disabilities in 1965. Federal Firearms Act, Pub. L. No. 89-184, 79 Stat. 788. That provision was enacted after the Olin Mathieson Chemical Corporation, the parent corporation of the firearms manufacturer Winchester, was convicted of a felony. H.R. Rep. No. 708, 89th Cong., 1st Sess. 2-3 (1965). The relief provision allowed Winchester to remain in business. In 1986, Congress added the provision allowing for judicial review. Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449. A decade before Congress added the judicial review provision, the Ninth Circuit had held that an applicant for relief could obtain judicial review under the APA of a denial of an application. *Kitchens v. Department of Treasury*, 535 F.2d 1197, 1199-1200 (1976).

The *Kitchens* case does not support the position of the Petitioners. The *Kitchens* case supports the decision of the Fifth Circuit that independent judicial action is appropriate where, as here, the Director of ATF failed to act on the application of Bean for relief from disabilities.

Contrary to the contention of the Petitioners, in *Kitchens*, the court in 1976 considered the application for relief from disabilities under 18 U.S.C. 925(c) and an appeal of the decision of the Acting Director of ATF under the Administrative Procedure Act. In its analysis, the Ninth Circuit noted that the District Court had original jurisdiction to consider the application for relief from disabilities under 28 U.S.C. 1337 (a) as a "civil action or proceeding arising under any Act of Congress regulating commerce." The Ninth Circuit went on to note that "[t]his action arises under the Gun Control Act of 1968 which is a statute regulating commerce." Although the court in *Kitchens* analyzed whether the ATF's action was properly reviewable under the Administrative Procedure Act, the Ninth Circuit made it clear that the District Courts have original jurisdiction to grant relief from firearms disabilities. This Court previously alluded to such avenues of relief in *Lewis v. U.S.* (1980) in the dissent.

This case, like *Kitchens*, involves a matter arising under the Gun Control Act of 1968. The District Court in this case had original jurisdiction under 28 U.S.C. 1337(a) to consider Bean's application for relief from firearms disabilities. That being so, the entire argument of the Petitioners concerning the scope of review, Bean's opportunity to seek judicial review, and the District Court's authority to grant a judicial restoration of rights is irrelevant. Bean had that right to obtain a judicial restoration of rights and regardless of the analysis of the Fifth Circuit, there was no error below.

B. 18 U.S.C. 925(c) Places The Duty To Consider Restoration Of Firearms Rights On The Secretary

Of The Treasury, Not the Director Of ATF.

The brief of the Petitioners uses the terms "Secretary" and "ATF" interchangeably in discussing the issue of funding by Congress for the processing of applications for relief from Federal firearms disabilities. However, the Secretary and the ATF are not interchangeable in terms of congressional intent. Congress placed the duty on the Secretary in 18 U.S.C. 925(c) to conduct the processing. There is no requirement in 18 U.S.C. 925(c) that the Secretary delegate the authority to process applications for the relief from disabilities. The Secretary allowed the processing of applications for relief from disabilities to be considered by the Director of the ATF by virtue of 27 C.F.R. 178.144(b) and (d). Although 27 C.F.R. 178.144(b) and (d) allow the Director of ATF to grant a relief from disabilities, there is no clear delegation of the decision making process only to the Director of ATF. That duty remains with the Secretary. If Congress had intended to eliminate the processing of all applications for relief from disabilities, Congress would have eliminated the Secretary's funding, not merely the funding of ATF for the processing of applications. This is not a case like *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992), where the intent of Congress to modify was "not only clear, but express."

The reason that the Congress might wish to defund the processing of applications by the ATF may be apparent in the *amicus curiae* brief filed by the Violence Policy Center (VPC). According to that brief, the ATF has a history of restoring firearms rights to, for example, a sexual predator with a history of violence, and persons convicted of supplying explosives to terrorists. According to the VPC, "many felons whose firearms privileges were restored under

Section 925(c) used those firearms to commit further crimes, including violent crimes." With a history of the types of failures claimed by the VPC, it is reasonable to consider that some members of the Congress might wish to defund the ATF's efforts. Or, just as likely, Congress may have wished ATF to use its resources in investigating crimes, not to conduct investigations concerning firearms rights restoration. In either case, or in the many other possible reasons for Congress to defund ATF's efforts in such investigations, Congress' intent is not clear.

Failing to fund the ATF to process applications does not show a clear intent to eliminate the processing of applications.[2] Without a direct repeal of 18 U.S.C. 925(c) language concerning the duty of the Secretary, it does not follow that Congress intended that the Secretary would not be required to conduct his statutory duty.

When the application for relief from disabilities was filed by Bean with the ATF, it was the duty of the Secretary to comply with the congressional intent expressed in 18 U.S.C. 925(c) that rights be restored if the applicant meets the criteria in the statute. By the Secretary's failing to take any action on the request by Bean, Joint Appendix, p. 27, and by the ATF's refusal to process the request, Joint Appendix, p. 33, the Secretary effectively denied Bean the restoration of his constitutionally protected rights. Under 18 U.S.C. 925(c), that was a matter that could be brought to the attention of the District Court, and remedied thereby.

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2. It is interesting to note that some ATF funds were used for letterhead, envelope, postage and work time to process a letter of denial for Bean's application.

C. The Failure Of The Director To Act Was A Denial Which Was Also Reviewable By The District Court.

5 U.S.C. 551(13) defines "agency action" as ". . ., or a failure to act." 5 U.S.C. 706 allows the District Court:

> To the extent necessary to decision and when presented, the reviewing court shall decide . . . and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be -
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> * * *
>
> (D) without observance of procedure required by law;
>
> * * *
>
> (F) unwarranted by the facts to the extent that

> the facts are subject to trial de novo by the reviewing court.
>
> * * *

The District Court, then, is allowed to consider a failure to act by the Director of the ATF and to hold such agency action unlawful and grant a petitioner relief. Under the Administrative Procedure Act, if you consider the wording of the Code sections, a failure of the Director to act is the same as a denial, which can be remedied in the first instance by the District Court.

The District Court, in considering the petition of Bean had no evidentiary record from the Secretary or the Director that would have justified a denial of Bean's application. The District Court, under the authority of 18 U.S.C. 925(c), had the power to allow Bean to present the evidence that the Secretary and the Director refused to consider the application to prevent an "arbitrary" or "capricious" denial or "a miscarriage of justice"among other reviewable errors. That evidence was sufficient to convince the District Court that it was error for the Secretary to fail to restore Bean's gun rights.

D. Congress Knew Courts Were Reviewing Denials, But Failed to Enact Reforms.

Another problem for the Petitioners is that Congress has been aware for many years that Circuit Courts have reviewed the rights of individuals after being denied by both the Secretary and the ATF.

The often repeated quote from Sen. Simon merely underscores this point. "Let me make this point perfectly

clear: It was never our intent, nor is it now, for the courts to review a convicted felon's application for firearm privilege restoration." 142 Cong. Rec. S12164 (daily ed. Oct. 2, 1996)

One Senator's speech does not make the Congress' intent clear. However, it shows that for a minimum of nearly six years, Congress has failed to expressly prohibit the courts from intervening in cases like *Bean* when an application is summarily denied without proper review.

E. The Secretary And ATF Already Had The Power to Deny All Applications According To Petitioners.

The Petitioners make the claim that the Secretary already had broad powers to deny any and all applications.

> Prior to its suspension, Section 925(c) assigned broad discretion to the Secretary of the Treasury to determine whether a convicted felon's application for relief should be granted: Under Section 925(c), relief from firearms disabilities could be granted if it was established to the Secretary's satisfaction that the statutory preconditions for relief were satisfied. 18 U.S.C. 925(c).... Even when the Secretary was satisfied that the preconditions for relief were met, Section 925(c) provided only that the Secretary "may" grant relief, not that he was required to do so . . ..

What is the real difference between an improper review and no review when both are creating a miscarriage of justice? Due process in the courts must apply to both situations, as the Constitution requires.

The Petitioners claim that the Secretary was not required to act on any applications even before the defunding occurred. This raises a key point. If the Secretary had merely told the ATF to quit reviewing any applications for relief from disability based on funding priorities or on a mere whim, would that have barred judicial review?

We believe not. Such wholesale denials would be arbitrary, capricious and create miscarriages of justice. The courts would be forced to intervene in some cases like *Bean*. Simply because Congress did what the Petitioners claim the Secretary could have already accomplished does not make this any different. No review is an improper review. The result is the same–a denial of due process.

F. The District Court Is The Appropriate Forum Where The Secretary Fails To Perform His Statutory Duty.

In its Summary of Argument, the brief of the Petitioners asserts:

> Allowing district courts to grant relief from firearms disabilities to convicted felons would also create the very dangers that Congress sought to avert by imposing a bar on the use of appropriated funds by ATF. District courts are not in a position to undertake the sort of investigations that would be required to determine whether an applicant's firearms disabilities should be removed, and they have no greater ability than ATF to ensure that felons who have their firearms privileges

restored will not pose an unacceptable risk to the public.

Although the Petitioners' brief contends that the District Courts are ill equipped to resolve such a complex factual issue, if the courts are capable of resolving whether a citizen should suffer capital punishment, it would seem that the District Courts should be able to evaluate the competing interests of the government and a citizen in a simple restoration of constitutionally guaranteed rights. Some might believe that the District Courts are better able than administrators to make such important determinations concerning personal liberty.

In fact, the VPC makes both a mistake and undermines their own case on Page 5 of their Amicus brief. First, Mr. Alan Gottlieb was never charged with "tax evasion," nor was he convicted of that crime. He was found guilty of a lesser charge under 26 U.S.C. 7206(1). Gottlieb's right to own firearms was restored on Dec. 9, 1986 by the Dept. of the Treasury, Bureau of Alcohol, Tobacco and Firearms.

More importantly, the VPC claimed that:

VPC commenced an investigation, expecting to find a selective program granting "relief" to a few felons, most of whom had committed white collar crimes. *See id.* Instead, VPC discovered that ATF had restored the firearms privileges of thousands of felons, whose crimes included sexual assault, drug dealing, terrorism, homicide, and armed robbery. *See id.* at 42-43.

If all of these allegations are true, and these arrests actually lead to convictions, then this only undermines the VPC's and the Government's contention that the courts couldn't do as good a job as the ATF. Furthermore, the courts are the proper venue for granting relief to prevent a "miscarriage of justice" like the *Bean* case, and to prevent the "arbitrary" or "capricious" wholesale denial of all applications, and the courts have broad authority to grant proper, equitable relief, particularly considering fundamental individual rights.

G. Gun Ownership Is A Fundamental, Individual Right, Not A Privilege.

The VPC contends in its *amicus curiae* brief that gun ownership is a "privilege," not a right. In its petition requesting certiorari, the Petitioners referred to gun rights as a privilege. The right to keep and bear arms is a fundamental personal right guaranteed by the Second Amendment to the Constitution of the United States.

In its briefs in opposition to certiorari in the cases of *Timothy Joe Emerson, Petitioner, v. United States of America,* Case No. 01-8780, and *John Lee Haney, Petitioner, v. United States of America*, Case No. 01-8272, the Petitioners herein conceded that it is the constitutional right of private citizens to own guns, possess and bear them, without regard to being a member of a militia or military service:

"In its brief to the court of appeals, the government argued that the Second Amendment protects only such acts of firearm

possession as are reasonably related to the preservation or efficiency of the militia. See Gov't C.A. Br. 11-29. The current position of the United States, however, is that the Second Amendment more broadly protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms, subject to reasonable restrictions designed to prevent possession by unfit persons or to restrict the possession of types of firearms that are particularly suited to criminal misuse. See Memorandum From the Attorney General To All United States Attorneys, Re: *United* States *v. Emerson,* Nov. 9, 2001. A copy of that memorandum is appended to this brief."

In *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), the Fifth Circuit engaged in an exhaustive analysis of this Court's decision in *United States v. Miller*, 307 U.S. 174 (1939) and the historical perspective of the Second Amendment. The court therein held that the Second Amendment guaranteed a personal right to own and possess firearms. That case was before this Honorable Court for consideration of certiorari in Case No. 01-8780. On June 10, 2002, the petition for certiorari was denied. The Amicus Curiae Second Amendment Foundation urges the Court to acknowledge and adopt the reasoning and conclusion of the Fifth Circuit in the *Emerson* case and define the personal fundamental guarantee of firearms ownership, possession and use, without regard to membership in a militia or the military.

The practical importance to this case is apparent from a determination that individuals have a fundamental personal right to firearms ownership and possession. If Bean has a fundamental personal right to firearms ownership and possession, the government cannot deny him a hearing for the restoration of said right. If the Secretary refuses to perform his statutory duty, what better place for Bean to seek a vindication of his rights than in the courts, the historical guarantor of due process of law.

H. In Consideration Of The Right Guaranteed By The Second Amendment, Deference In The Review Should Favor Respondent.

As mentioned above, this case is about much more than just allowing Mr. Bean to own firearms once again after being convicted in a foreign country of an obscure crime that would not be prosecutable for an adult eligible to own firearms in this country. This case is about whether or not Respondent originally had a "right" or only a "privilege" to own a firearm before his conviction. Addressing this issue is necessary in order to properly review whether Congress can prohibit Respondent from seeking to restore his ability to own a firearm by merely defunding a small portion of an active federal law, even though there are other avenues for relief as mentioned above under the District Court's original jurisdiction under 28 U.S.C. 1337(a) as well as 5 U.S.C. 706.

A key portion of Mr. Bean's original District Court Petition for Relief from Disabilities Under the Federal Firearms Act read:

Prior to this unintentional violation of a

> foreign law, Petitioner enjoyed all of the liberties of a United States citizen.

This Amicus holds that one of these liberties—guaranteed under the Second Amendment—is the right to keep and bear arms, and this is the right Mr. Bean seeks to restore. This is a fundamental right of individuals, and not the states, just as the other portions of the Bill of Rights enumerating "the right of the people" are interpreted as individual rights. It has been over 210 years since the ratification of the Second Amendment, yet this provision remains mostly undefined.

In an effort to understand Mr. Bean's plight, and the importance of his attempt to restore his ability to possess firearms, this Court should provide some explanation of the substantive right that he is seeking to reinstate.

I. The Second Amendment Right Is Not Meant for Dangerous Individuals.

The Second Amendment reads,

> A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

This Court should not give in to fears by extremists that by defining the Second Amendment as an individual right, this will somehow allow violent criminals and deranged individuals to legally possess modern firearms with impunity. This court has already ruled in a footnote in *Lewis*

v. United States, 445 U.S. 55 (1980) that prohibiting convicted felons from owning guns until their rights are restored does not violate any constitutional protections.

More dramatically, in *Johnson v. Eisentrager,* 339 U.S. 763 (1950), this court noted that the United States is able to prohibit its enemies from using our constitution as a way to avoid prosecution. A key portion of the decision reads:

> If the Fifth Amendment confers its rights on all the world except Americans engaged in defending it, the same must be true of the companion civil-rights Amendments, for none of them is limited by its express terms, territorially or as to persons. Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and "werewolves" could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against "unreasonable" searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.

While this case was about alien enemies on occupied alien territory, this case is notable because the Second Amendment is again listed as one of the "civil-rights" Amendments along with other portions of the Bill of Rights and this right has limitations when it comes to dangerous individuals, including "werewolves."

In *Ex Parte Milligan,* 71 U.S. 2 (1866), this Court noted that the Second Amendment's right to keep and bear

arms would not "hinder the President from disarming insurrectionists, rebels, and traitors in arms while he was carrying on war against them."

In short, stating that the Second Amendment right to keep and bear arms is an individual right is not a precursor to anarchy and chaos.

J. The "People" And The "Militia" In The Second Amendment.

This court has already determined that the "people" in the First, Second, Fourth, Ninth and Tenth Amendments are individuals, not the States. This is particularly necessary since the Framers used both the term "people" and the "States" within the Tenth Amendment dealing with "powers" and not "rights." People have both rights and powers while the States have only powers.

This Court had an excellent discussion of "the people" in the *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Chief Justice Rehnquist, along with Justices White, O'Connor, and Scalia ruled that Rene Martin Verdugo-Urquidez (an illegal alien) was not one of "the people" and therefore was not granted protection under the Fourth Amendment. Their ruling allowed the admission of evidence seized in a warrant-less search of his Mexican property.

Chief Justice Rehnquist, in his delivered opinion of the Court, states that regarding the use of "the people":

"Contrary to the suggestion of *amici curiae*

that the Framers used this phrase 'simply to avoid [an] awkward rhetorical redundancy,' Brief for American Civil Liberties Union, et al., as Amici Curiae 12, n 4, 'the people' seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by 'the People of the United States.' The Second Amendment protects 'the right of the people to keep and bear Arms,' and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to 'the people.' See also US Const, Amdt 1, ('Congress shall make no law . . . abridging . . . *the right of the people* peaceably to assemble'); (emphasis added) Art I, S 2, cl 1 ('The House of Representatives shall be composed of Members chosen every second Year *by the People of the several States* ') (emphasis added). While this textual exegesis is by no means conclusive, it suggests that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom the rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."

In a separate opinion, although concurring with the final ruling, Justice Kennedy believed that:

> ". . . explicit recognition of 'the right of the people' to Fourth Amendment protection may be interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it."

Justice Kennedy agreed with the final decision because the search and seizure took place outside U.S. borders. Otherwise, he felt that the Amendments, including the Fourth, would provide protection for an illegal alien.

Even the dissenting opinions of Justices Brennan and Marshall give credence to the individual interpretation of the Second Amendment. In fact, these Justices rejected the narrow interpretation of "the people" given by the majority.

Justice Brennan cited that in drafting the Fourth Amendment:

> "They [the drafters] could have limited the right to 'citizens,' 'freemen,' 'residents,' or 'the American people.' . . . But the drafters of the Fourth Amendment rejected this limitation and instead provided broadly for '[t]he right of the people to be secure in their persons, houses, papers, and effects.'"

Both dissenting Justices described "the people" as "the governed." They claimed that by making a person obey our laws while even in his own country, he literally has become one of "the governed" and therefore the protection under the Amendments should apply.

Without a doubt, all of the definitions by the Justices would make "the people" certain qualified individuals, not the states or any other entity. Whether "the people" is interpreted as the "citizens," "freemen," "residents," "American people," or "the governed," in the Second Amendment, it still remains an individual's right to keep and bear arms.

The individual right to keep and bear arms by "the people" was made clear in the infamous *Dred Scott v. Sanford,* 19 How. 393 (1866), wherein the court upheld slavery in part because if the slaves were freed, they would be guaranteed all the protections listed under the Bill of Rights, including the ability to "carry arms wherever they went" under the Second Amendment.

This court has often mentioned the personal nature of the right of individuals to own firearms.[3] Most recently, Justice Stevens in two dissents has mentioned this individual right in non-militia cases.

In *Muscarello v. U.S.*, 524 U. S. 125, 132 (1998),

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3. For additional information, see David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*: St. Louis University Public Law Review: Gun Control Symposium, vol 18, no. 1, 1999: 99; David B. Kopel, *The Sound of the Supremes: A Reply to Professor Yassky*:Louis University Public Law Review: Gun Control Symposium, vol 18, no. 1, 1999: 203; David B. Kopel, *The Second Amendment in the Nineteenth Century,* 1998: 1359. Brigham Young University Law Review: Second Amendment Symposium, 1998, No. 1.

Justice Stevens correctly wrote in discussing the meaning of the term "carries a firearm," that, "Surely a most familiar meaning is, as the Constitution's Second Amendment ("keep and bear arms")…"

That same year, Justice Stevens in *Spencer v. Kemna,* 523 U.S. 1 (1998), wrote that a criminal conviction "may result in tangible harms such as imprisonment, loss of the right to vote or bear arms . . .. " Mr. Bean is now trying to reverse the "tangible harm" for a foreign conviction that is not even a crime in the United States for the average adult citizen.

On four occasions, various Justices have favorably quoted a key portion of Justice Harlan's dissent in *Poe v. Ullman,* 367 U.S. 497 (1961):

> "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the

> state needs asserted to justify their abridgment." *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (dissenting opinion).

See *Albright v. Oliver,* 510 U.S. 266 (1994) (Stevens and Blackmun dissent); *Planned Parenthood of Southeastern PA v. Casey*, 505 U.S. 833 (1992) (O'Conner, Kennedy and Souter); *Moore v. East Cleveland*, 431 U.S. 494 (1977) (Powell, Brennan, Marshall and Blackmun); and *Roe v. Wade*, 410 U.S. 113 (1973) (Stewart concurring).

In none of these cases was the reference to the Second Amendment's "right to keep and bear arms" removed from the list of individual rights protected from both federal and state infringement.

Claims that the "Militia" in the Second Amendment is now the National Guard cannot stand either. This Court has ruled that the National Guard is not the Militia under the Second Amendment and that the National Guard is part of the Armed Forces. See *Perpich v. Department of Defense*, 496 U.S. 334 (1990). In that case, the militia was divided into two classes—"organized" and "reserve militia" later called the "unorganized militia."

10 U.S.C. 311 (a) clearly states that all males between the ages of 17 and 45 who are either citizens of the United States or have declared their intent to become citizens are members of the unorganized militia. This definition may be sexist and age discriminatory by today's standards, since it is an old section, but it nevertheless shows the intended wide coverage of the term, "militia."

The court has previously ruled on this matter. In *Houston v. Moore,* 5 Wheat. 1 (1820), the court in a dissent seemed to distinguish the Militia Powers under Article 1, Section 8, of the Constitution and the right to keep and bear arms under the Second Amendment.

Presser vs. Illinois, 116 U.S. 252 (1886), makes the Second Amendment "militia" more clear. Mr. Justice Woods, in a bold statement proclaimed that:

> "It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United states, as well as that of the states; and in view of this prerogative of the general government as well as of its general powers, the States' cannot, even laying the constitutional provisions in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government."

In *United States v. Schwimmer*, 279 U.S. 644 (1929), *United States v. MacIntosh,* 283 U.S. 605 (1931) and *U.S. v. Bland,* 283 U.S. 636 (1931), overruled *Girouard v. United States,* 328 U.S. 61 (1947), the court repeatedly denied naturalization to individuals, including a woman in *Schwimmer*, who would not "bear arms in defense of the United States." It took "affirmative action" by Congress in 1942 to overrule this position, *Girouard v. United States, supra.*

The Supreme Court decision *U.S. vs. Miller,* 307 U.S. 174 (1939), is an interesting case dealing with the composition of the militia. To begin with, only the national government was represented at the trial. With nobody arguing to the contrary, the court followed standard court procedure and assumed that the law was constitutional until proven otherwise.

As to the militia, Mr. Justice McReynolds related the beliefs of the Founding Fathers when commenting historically about the Second Amendment. He stated that:

> ". . .The common view was that adequate defense of country and laws could be secured through the militia- civilians primarily, soldiers on occasion.
>
> "The significance attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. 'A body of citizens enrolled for military discipline.' And further that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."

It is interesting to note that Miller was an individual, and not a member of the State or National Guard. The *Miller*

court never questioned whether Miller was part of the militia and focused on the type of weapon he possessed. The mere fact that the there was a question over which arms received protection indicated that the right is for individuals, not the states. Otherwise, the court simply would have stated that Miller had no standing under the Second Amendment as an individual and there would have been no question as to which arms he could keep at all. [4]

By combining the historic definition for the militia, "as all persons capable of bearing arms", and a restrictive definition for "the people," such as "the citizens", the Second Amendment clearly reads as an individual right.

It should now be extremely difficult, if not impossible, to construe the Second Amendment any other way than to ratify an individual's right to "keep and bear" arms.

K. Second Amendment Expanded Under The Fourteenth Amendment

Even if one wanted to make the subordinate militia clause of the Second Amendment dominate over the independent clause of the right of the people to keep and bear arms, such folly must end after the enactment of the Fourteenth Amendment.

One of the major concerns during reconstruction was

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4. See the Fifth Circuit Decision in *U. S. v. Emerson, supra,* for a detailed discussion of *Miller* and of the history of the Second Amendment in general.

the disarming of newly freed slaves as well as their abuse and murder. Many of the drafters and supporters of the Fourteenth Amendment specifically listed the right to keep and bear arms as a reason for enacting it while opponents cited this right as a reason against it.

Representative John Bingham, author of Section 1 of the Fourteenth Amendment, included the Second Amendment among, "These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteen amendment. The words of that amendment, 'no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States,' are an express prohibition upon every State of the Union." Stephen P. Halbrook, *The Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (for historical context and Founders intent for the Fourteenth Amend., the Freedmen Bureau Acts, and the Civil Rights Act of 1871), Praeger Publishers, 1998, page 126.

Bingham also specifically mentioned the right to keep and bear arms in speeches to his constituents. Holbrook, *Id.* Page 131.

The court has repeatedly noted the problems in the South in this period. In *Duncan v. Louisiana,* 391 U.S. 145 (1968), the court in the concurrence noted that Senator Howard, who introduced the Fourteenth Amendment in the Senate, listed one of the reasons to enact the Amendment was the "right to keep and bear arms" among other individual rights.

In *Bell v. Maryland,* 378 U.S. 226 (1964), this court

in a footnote stated, "Negroes were not allowed to bear arms or to appear in all public places." The Fourteenth Amendment was designed to stop such abuse from continuing.

Even scholars originally limiting the individual right under the Second Amendment to the militia clause are forced to admit the new dynamics under the Fourteenth Amendment:

> At the Founding, the right of the people to keep and bear arms stood shoulder to shoulder with the right to vote; arms bearing in militias embodied a paradigmatic *political* right flanking the other main political rights of voting, office holding, and jury service. Thus "the people" and the "militia" at the heart of the Second Amendment were quintessential voters and jurymen, the same "people" in the Preamble, in Article I, section 2, and in the First, Fourth, Ninth, and Tenth Amendments. But Reconstruction Republicans recast arms bearing as a core *civil* right, utterly divorced from the militia and other political rights and responsibilities. Arms were needed not as part of political and politicized militia service, but to protect one's individual homestead. Everyone—even nonvoting, nonmilitia-serving women—had a right to a gun for self-protection. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction*, Yale Univ. Press (1998), Page 258-259.

As seen in this discussion, the Second Amendment's right to keep and bear arms is one of our most fundamental

individual rights. Since this is the specific right Mr. Bean is seeking to restore, the importance of this right and the obvious lack of danger Mr. Bean represents must go hand in hand in the court's decision.

CONCLUSION

Nobody is alleging that Bean represents a credible threat. Under any reasonable standard, it is clear that Bean's application was only summarily denied for lack of ATF funding and inaction by the Secretary. A quick review of his case follows.

Bean was convicted of a non-violent violation of a foreign law for possession of ammunition that would be legal for a law-abiding adult to possess in this country. It was through the accidental inaction of a third party that caused the violation by failing to remove everything from Bean's vehicle. The Mexican government even reduced the penalty for this crime from a felony to a misdemeanor after this case was made public.

Since Mr. Bean needed the restoration for the renewal his Federal Firearms License, his business needs are similar to that of Winchester and other corporations needing relief and that are still provided funding under the law. Since ATF funds are available for the restoration of "rights" of corporations, then there should be a means for the more fundamental individual rights of Bean, or at least due process review.

At the district court, Bean presented an impressive

character witness list as well. His plight has earned unanimous support for rights restoration by all four judges hearing the facts of his case.

The bottom line is that both the Secretary and the ATF failed to act on a person convicted of a foreign crime that was both perfectly legal and constitutionally protected in this county. Such dismissals are both "arbitrary and capricious" and in this particular case, created a "miscarriage of justice." These are all reasons for the court to intervene even if the original jurisdiction is ignored under 28 U.S.C. 1337(a).

For the foregoing reasons, the Amicus Curiae Second Amendment Foundation urges the Court to define the personal fundamental right of individuals under the Second Amendment to the Constitution of the United States and affirm the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of this Amicus Brief of the Second Amendment Foundation has been served by regular U.S. mail, postage prepaid, on this 14th day of June, 2002 on the following counsel of record for the Petitioner and Respondent:

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June 12, 2002

William M. Gustavson
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Re: United States v. Bean, No. 01-704

Dear Mr. Gustavson:

As requested in your letter of June 11, 2002, I hereby consent to the filing of a brief amicus curiae on behalf of the Second Amendment Foundation in support of the respondent in the above-styled case.

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Emily C. Spadoni, Supervisor, Case Management, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov**. Ms. Spadoni's direct dial phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

Sincerely,

Theodore B. Olson
Solicitor General

cc: William K. Suter, Esquire
Clerk
Supreme Court of the United States
Washington, D.C. 20543

No. 01-704

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

THOMAS LAMAR BEAN, RESPONDENT

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

NOTICE OF CONSENT FOR
SECOND AMENDMENT FOUNDATION
TO FILE *AMICUS CURIAE* BRIEF
IN SUPPORT OF RESPONDENT

The undersigned hereby give consent for the Second Amendment Foundation to file an *amicus curiae* brief in support of Respondent.

Counsel for the Petitioner

Counsel for Respondent, Larry C. Hunter